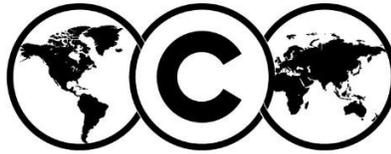


# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®



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February 8, 2013

*Submitted via regulations.gov Docket No. USTR-2012-0022*

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 2013 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 2013 Special 301 Hearing (77 Fed. Reg. 77178, Dec. 31, 2012)**

Dear Mr. McCoy:

The International Intellectual Property Alliance (IIPA) submits this response to the Federal Register notice that invites “written submissions from the public concerning foreign countries’ acts, policies, or practices that are relevant to deciding whether a particular trading partner should be identified as a priority foreign country under Section 182 of the Trade Act or placed on the Priority Watch List or Watch List.” 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). This year’s notice also makes two additional requests: 1) that submissions include specific references to laws, regulations, policy statements, executive, presidential or other orders, administrative, court or other determinations, and any other measures relevant to the issues raised in the written submission or hearing testimony; and 2) that, where relevant, submissions mention particular regions, provinces, states, or other subdivisions of a country in which an act, policy, or practice is believed to warrant special attention.<sup>1</sup>

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 and territories. In this year’s filing, including this Submission Letter and appendices, IIPA reports on 42 countries/territories noted in the chart in Section C of this Submission Letter, mentions 3 countries for positive achievements (two of which also appear as country reports), and mentions 6 countries for issues related to bilateral, regional, or multilateral IPR obligations worthy of discussion.

IIPA requests that Ukraine be designated as a Priority Foreign Country in this year’s review. IIPA also requests that 32 other countries appear on the Special 301 Priority Watch List or Watch List. IIPA has also recommended that USTR conduct an out-of-cycle review (OCR) later in 2013 on Thailand. IIPA will also file under separate cover a Notice of Intent to Testify at the February 20, 2013 public hearing on Special 301.

<sup>1</sup>With regard to both of these requests, we note that all of the country appendices contain specific references to laws, regulations, policy statements, executive, presidential or other orders, administrative, court or other determinations, and any other measures relevant to the issues raised in this written submission, and that the country appendices mention particular regions, provinces, states, or other subdivisions of a country in which an act, policy, or practice is believed to warrant special attention, where relevant.



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

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 (GDP), 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. 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.<sup>2</sup> Linkages between copyright protection and economic development in other countries are documented by the World Intellectual Property Organization's 2012 study, *Copyright + Creativity = Jobs and Economic Growth: WIPO Studies on the Economic Contribution of the Copyright Industries*, compiling similar studies in 30 countries.<sup>3</sup> WIPO reports the completion of a total of 39 country studies, with more in the pipeline. Other studies have measured the contribution of certain sectors to national economies,<sup>4</sup> or the multiplier effects of reducing piracy on contribution to GDP, job growth, and tax revenues.<sup>5</sup>

While these studies amply demonstrate the contribution of copyright-based industries to the economy, they do not reveal the massive costs imposed by overseas piracy and market access barriers to U.S. copyrighted products and services. Content industries are forced to face unfair competition from those who engage in piracy as a high-profit, low risk enterprise. Today, legitimate businesses built on copyright are facing increased threats, as they must compete with

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<sup>2</sup>See Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2011 Report*, November 2, 2011. The entire report as well as summaries can be accessed at [http://www.iipa.com/copyright\\_us\\_economy.html](http://www.iipa.com/copyright_us_economy.html). 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.

<sup>3</sup>World Intellectual Property Organization, *Copyright + Creativity = Jobs and Economic Growth: WIPO Studies on the Economic Contribution of the Copyright Industries*, 2012 (on file with IIPA). In 2003, the World Intellectual Property Organization (WIPO) published a guidebook on the economic parameters to develop such studies entitled *Guide on Surveying the Economic Contribution of the Copyright-Based Industries* (WIPO Publication No. 893) (2003), at [http://www.wipo.int/copyright/en/publications/pdf/copyright\\_pub\\_893.pdf](http://www.wipo.int/copyright/en/publications/pdf/copyright_pub_893.pdf). The guidelines have been implemented in over 39 countries around the world, and studies have been published so far in 30 countries, including: Australia (2007), Bhutan (2011), Brunei (2012), Bulgaria (2011), Canada (2004), China (2011), Colombia (2010), Croatia (2010), Finland (2011), Hungary (2006), Jamaica (2008), Kenya (2011), Latvia (2006), Lebanon (2008), Malaysia (2011), Mexico (2008), Netherlands (2011), Pakistan (2011), Panama (2011), Peru (2011), Philippines (2008), Republic of Korea (2012), Romania (2010), Russia (2010), Singapore (2004), Slovenia (2011), South Africa (2012), Thailand (2012), and Ukraine (2010), and United States (2011).

<sup>4</sup>For example, the Motion Picture Association Asia Pacific has issued a series of “Economic Contribution of the Film and Television Industry” studies for Indonesia (2012), Japan (2012), South Korea (2012), Thailand (2012), New Zealand (2009, 2012), Australia (2011), India (2010), and Hong Kong (2009).

<sup>5</sup>See, e.g., BSA (now BSA | The Software Alliance) and IDC, *Piracy Impact Study: The Economic Benefits of Reducing Software Piracy: Israel*, 2010, at [http://portal.bsa.org/piracyimpact2010/cps/cp\\_israel\\_english.pdf](http://portal.bsa.org/piracyimpact2010/cps/cp_israel_english.pdf).



the massive proliferation of illegal services unencumbered by costs associated with either producing copyrighted works or obtaining rights to use them. An independent study released by BASCAP (Frontier Economics), *Estimating the Global Economic and Social Impacts of Counterfeiting and Piracy* (February 2011),<sup>6</sup> estimated the value of digitally pirated music, movies and software (not losses) at \$30-75 billion in 2010, and growing to \$80-240 billion by 2015. Others have issued reports on the economic consequences of piracy for specific industry sectors.<sup>7</sup> In many countries in this submission, rampant piracy is not only impeding the evolution of legitimate channels for distribution, but also threatens to damage permanently or displace existing and authorized distribution channels which are unable to compete with infringing business models.

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## B. SUMMARY OF THE IIPA 2013 SPECIAL 301 SUBMISSION

The IIPA 2013 Special 301 Submission provides information intended to assist the U.S. government in defining plans of action for the year ahead, to reduce global piracy levels, and to open markets to U.S. works protected by copyright in the identified countries/territories. Section C of this Submission Letter provides the IIPA recommendations for the 2013 Special 301 lists. Section D summarizes 12 major cross-cutting initiatives and challenges involved in improving copyright law and enforcement and lowering market access barriers to U.S. copyrighted materials. Appendix A to the Submission includes all the country surveys.<sup>8</sup> Appendix B describes IIPA members' methodologies for estimating the scope of piracy in various countries. Appendix C provides a chart of countries/territories' placement on Special 301 lists by USTR since 1989.<sup>9</sup> 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 of Special Mention, or appearing on past lists, is available as an Additional Appendix on the IIPA website, at <http://www.iipa.com/pdf/2013SPEC301HISTORICALSUMMARY.pdf>.

### Countries Deserving of Recognition for Progress Made in 2012 in Copyright Protection and Enforcement

IIPA recognizes and welcomes important steps taken by the following countries in 2012:

- **Brunei:** Law enforcement authorities continued to cooperate with rights holders, including a raid in December 2012 against a large retail chain engaged in piracy. The owner of the company was found guilty and sentenced to six weeks in jail in Brunei's first criminal copyright case.<sup>10</sup> This action followed the cleaning up of the retail market in May 2012 as a result of a Municipal Department directive to empty shelves of pirated DVDs, music and software or face closure.<sup>11</sup> Notwithstanding challenges in the Internet environment, physical piracy of music is now reportedly roughly 30%, which marks a general decline. With software piracy remaining at 67% in 2011 and some remaining enforcement hurdles, Brunei will need to take steps (highlighted in previous reports), both in terms of legislative

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<sup>6</sup>Frontier Economics, *Estimating the Global Economic and Social Impacts of Counterfeiting and Piracy: A Report Commissioned by Business Action to Stop Counterfeiting and Piracy (BASCAP)*, February 2011 (on file with IIPA). The report builds on a previous OECD study (*The Economic Impact of Counterfeiting and Piracy (2008)*)

<sup>7</sup>The Motion Picture Association has commissioned studies from IPSOS and Oxford Economics on *Economic Consequences of Movie Piracy: Japan (2011)* and *Economic Consequences of Movie Piracy: Australia (2011)*. BSA's most recent study estimating the software piracy rate and commercial value of unlicensed software in more than 100 markets is at <http://portal.bsa.org/globalpiracy2011/>. A 2010 study looking at the economic impact of piracy in select countries is at <http://portal.bsa.org/piracyimpact2010/index.html>.

<sup>8</sup>Country 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.

<sup>9</sup>Fifteen of these countries/territories have appeared on a Special 301 list each year since 1989, and are recommended by IIPA to appear there again. A 1994 amendment to Section 182 of the Trade Act, dealing with identification of "priority foreign countries," provides that the U.S. Trade Representative must take into account "the history of intellectual property laws and practices in the foreign country, whether the country has been identified as a priority foreign country previously, and U.S. efforts to obtain adequate and effective intellectual property protection in that country." Uruguay Round Agreements Act Statement of Administrative Action, *reprinted in* H.R. Doc. No. 103-316, vol. I, at 362 (1994). Under these criteria, these 15 countries/territories named by IIPA are particularly vulnerable.

<sup>10</sup>*Brunei's Fight Against Piracy Pays Dividends*, The Brunei Times, December 11, 2012, at <http://www.bt.com.bn/letters-editor/2012/12/11/bruneis-fight-against-piracy-pays-dividends>.

<sup>11</sup>Quratul-Ain Bandial, *With No Access to DVDs, Many Eye Online Piracy*, The Brunei Times, May 26, 2012, at <http://www.bt.com.bn/news-national/2012/05/26/no-access-dvds-many-eye-online-piracy>.



reforms and enforcement, to continue progress. Brunei’s participation in the Trans-Pacific Partnership (TPP) negotiations signals its commitment to further enhance its copyright protection and enforcement capacity.

- **Malaysia:** In 2012, Malaysia passed major amendments to its Copyright Act, joined the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) effective December 27, 2012, and appeared on the road to address copyright protections in the digital and online environment and to protect against unlawful camcording of motion pictures effectively. These changes in Malaysia are already having a positive commercial effect on some local copyright-based businesses. Remaining concerns, including the need for sustained enforcement efforts, are discussed in greater detail in a Special Mention report appended to this Submission. Malaysia’s participation in the TPP negotiations signals its commitment to further enhance its copyright protection and enforcement capacity.
- **Philippines:** The Intellectual Property Office of the Philippines, the Optical Media Board, and the Philippine National Police have closed several once-notorious piracy markets in Metro Manila, and appear poised to make more progress in Manila and beyond. The creative and innovative approach to addressing piracy and transforming an illegal market for the long term marks a positive success story and a hopeful path forward. Certain issues remain to be addressed, which are discussed in greater detail in a Special Mention report appended to this Submission.

### C. IIPA RECOMMENDATIONS FOR THE 2013 SPECIAL 301 LISTS

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

PRIORITY FOREIGN COUNTRY	PRIORITY WATCH LIST	WATCH LIST	COUNTRIES DESERVING SPECIAL MENTION
Ukraine (GSP)	Argentina Chile China (306) Costa Rica India Indonesia (GSP) Russian Federation (GSP)	Belarus Brazil Bulgaria Canada Ecuador Egypt Greece Israel Italy Kazakhstan Kuwait Lebanon (GSP) Mexico Pakistan Romania Saudi Arabia Spain Switzerland Tajikistan Thailand (OCR) Turkey Turkmenistan United Arab Emirates Uzbekistan (GSP) Vietnam	Albania Estonia Hong Kong Malaysia Malta Moldova Paraguay Philippines Taiwan
1	7	25	9



## **D. INITIATIVES OR CHALLENGES FOR 2013: REDUCE COPYRIGHT PIRACY, REMOVE MARKET ACCESS BARRIERS, STRENGTHEN LAWS**

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

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

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

- the unauthorized use of software or other copyright materials by enterprises or governments;
- the illegal copying, uploading, downloading, making available, communicating, and streaming of copyright materials on the Internet or mobile networks, or contributing to, benefitting from, promoting, or otherwise inducing the same, including, for example, rogue sites often cloaking themselves under the guise of legitimacy with advertising and payment methods recognized by consumers as authentic;
- the illegal camcording of movies from theater screenings;
- the illegal photocopying or pirate offset printing of books;
- the illegal public performance or broadcast of audiovisual works or sound recordings; and
- hard-disk loading of software or other copyright content onto computers, laptops, tablets, phones, or other mobile devices without authorization or license.

Related to piracy are activities such as:

- the development, manufacture, or distribution of circumvention technologies, devices, or components used to access, copy, or otherwise use copyright materials protected by technological protection measures;
- the development, manufacture, or distribution of “media boxes” including “HD players,” in which multiple gigabytes of storage space can accommodate 200 high definition movies and other content, and boxes that can directly link to websites providing illegal downloads of content to the boxes or pirated movie lists for customers to pre-select for delivery on the box, e.g., through the mail or a courier service.
- the trafficking in counterfeit software packaging, labels, holograms, certificates of authenticity, or documentation; and
- the development, manufacture, or distribution of pay-TV decryption technologies, devices, or components, or the unauthorized decryption of, or line-tapping to illegally obtain access to, pay-TV signals.

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

- dedicate enforcement resources commensurate with the scale of the piracy problem, to provide for “effective action” and “remedies that constitute a deterrent”<sup>12</sup> to infringement as the minimum required by the TRIPS Agreement, through civil, administrative, and criminal action, and effective adjudication in the courts;<sup>13</sup>

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<sup>12</sup>For effective deterrence, prosecutors and judges (or, where applicable, administrative agencies) should impose penalties that remove the monetary incentives that drive the pirate trade. Small fines do not deter pirates who stand to gain hundreds of thousands to millions of dollars. Recidivism is endemic in many countries. Deterrence requires substantial prison sentences in these cases.

<sup>13</sup>In many countries, specialized IP courts have been established, in addition to IP- or cybercrime-intensive investigative units with police and prosecutors. In the most successful examples, such specialized courts or divisions are starting to make a difference in their localities.



- train, build capacity, and empower enforcement authorities to investigate and prosecute copyright offenses;
- update laws and enforcement tools to meet the current piracy challenges;<sup>14</sup>
- direct government agencies, state-owned as well as privately held enterprises, contractors, and educational institutions to use only legal software, legal copies of textbooks, educational materials and professional and scholarly publications, and other copyright materials, and to ensure their networks or computers are not used for infringing purposes;
- ratify and fully implement the WCT and the WPPT and enforce resulting prohibitions as a means of reducing piracy;
- encourage cooperation by Internet service providers (ISPs) with all content owners, including notice-and-takedown systems for the hosted environment, and effective and fair mechanisms to deal with repeat infringers in the non-hosted environment and infringements on foreign websites; 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 created opportunities for faster, more efficient and more cost-effective distribution of information, products and services across the globe. The world boasts 2.4 billion Internet users as of June 2012, with an estimated 35% having fixed broadband,<sup>15</sup> and 1.1 billion mobile broadband users by the end of 2011.<sup>16</sup> This connectivity has had a positive transformative effect on many economies, but has also unfortunately led to massive infringement of music, movies, games, software, books and other reading 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% illegal video streaming; and 5.8% other peer-to-peer (P2P) file sharing (eDonkey, gnutella) or Internet protocols, such as Usenet, that are used for file sharing.<sup>17</sup> Research also indicates there is a correlation between addressing online piracy through legislation or shutting down a major suspected piracy service (as in the case of *MegaUpload*) and increases in legitimate distribution of copyright materials.<sup>18</sup>

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

- The motion picture industry's distribution patterns (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 motion picture, *The Grey*, which was released on January 27, 2012 in the United

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

<sup>15</sup> Internet World Stats, World Internet Usage and Population Statistics, June 30, 2012, at [www.internetworldstats.com](http://www.internetworldstats.com) (Internet usage information comes from data published by Nielsen Online, by the International Telecommunications Union, by GfK, local ICT Regulators and other reliable sources).

<sup>16</sup> International Telecommunications Union, *Mobile-Cellular Telephone Subscriptions Per 100 Inhabitants*, accessed January 24, 2013, at <http://www.itu.int/ITU-D/ict/statistics/>.

<sup>17</sup> Envisional, *Technical Report: An Estimate of Infringing Use of the Internet*, January 2011 (on file with IIPA).

<sup>18</sup> See, e.g., Brett Danaher, Michael D. Smith, Rahul Telang, Siwen Chen, *The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France*, January 21, 2012, available at SSRN: <http://ssrn.com/abstract=1989240> or <http://dx.doi.org/10.2139/ssrn.1989240> (increased consumer awareness of HADOPI caused iTunes song and album sales to increase by 22.5% and 25% respectively relative to changes in the control group); Dianna Dilworth, *How to Stop Piracy: Carnegie Mellon Professor Michael Smith at DBW*, January 16, 2013, at [http://www.mediabistro.com/appnewser/how-to-stop-piracy-carnegie-mellon-professor-michael-smith-at-dbw\\_b31162](http://www.mediabistro.com/appnewser/how-to-stop-piracy-carnegie-mellon-professor-michael-smith-at-dbw_b31162) (Carnegie-Mellon Economist Michael D. Smith indicates his research demonstrates that every 1% reduction in Megaupload usage translated into a 2.6-4.1% increase in legitimate digital sales).



States and Canada, was reportedly already available for illegal download on the *isoHunt* BitTorrent site the next day. By mid-afternoon on January 30, 2012, *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 issue 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 device piracy (e.g., stores that offer, often as an after-service to the sale of a mobile device, unlimited unauthorized downloading of content, and 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.
- Online piracy of entertainment software continues to be overwhelmingly international, as reflected in ESA vendor monitoring of P2P and direct download activity. Data drawn from ESA’s online vendor monitoring of P2P activity during 2012 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 Russia, Brazil, Italy, Spain, and Ukraine 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 2012 include India (6th place), Romania (10th place), Chile (11th place, up from 18th in 2011), Argentina (12th place, up from 21st in 2011), Turkey (13th place), and Mexico (14th place, a dramatic increase from its 28th place finish in 2011). 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 textbooks continues to increase significantly.
- Counterfeit software products remain 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 software, music, motion pictures, videogames, and published materials.

IIPA’s filing and those of its members to the U.S. Trade Representative in its 2012 Special 301 Out-of-Cycle Review of Notorious Markets present non-exhaustive but illustrative lists of examples of notorious online piracy markets and services.<sup>19</sup> Based on our filing and those of others in that docket, USTR named its list of “notorious markets” on December 13, 2012.<sup>20</sup> Many of the online “notorious markets” listed in the IIPA filing are discussed in detail in the country reports appended to this Submission.<sup>21</sup> These include:

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<sup>19</sup>See International Intellectual Property Alliance (IIPA), *IIPA Written Submission Re: 2012 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 77 Fed. Reg. 48583 (August 14, 2012), Docket No. USTR-2011-0011, September 14, 2012, at [http://www.iipa.com/pdf/2012\\_Sep14\\_Notorious\\_Markets.pdf](http://www.iipa.com/pdf/2012_Sep14_Notorious_Markets.pdf).

<sup>20</sup>United States Trade Representative, *Out-of-Cycle Review of Notorious Markets*, December 13, 2012, at <http://www.ustr.gov/sites/default/files/121312%20Notorious%20Markets%20List.pdf>. USTR’s list includes the following notorious online piracy markets: linking sites *Baixe de Tudo* (Sweden) and *Warezb* (registered in Sweden, hosted in Russia); hosting/cyberlocker sites *Rapidgator.net* (Russia), *Putlocker* (U.K.), and *Ex.ua* (Ukraine); B2B and B2C site *Paipai* (China); BitTorrent indexing sites *ThePirateBay* (Sweden), *IsoHunt* (Canada), *Kat.ph* (formerly *kickasstorrents*) (Canada), *torrentz.eu* (formerly *torrentz.com*) (Canada, Panama, Switzerland); BitTorrent trackers *Rutracker* (Russia), *Zamunda.net* (Bulgaria), and *Arenabg.com* (Bulgaria); social media sites *vKontakte* (Russia) and *Zing.Vn* (Vietnam) (also linking); and pay-per-download *Allofmp3* clones (Russia generally).

<sup>21</sup>The online “notorious markets” list demonstrates that many bad actors are abusing various technologies – all of which have legitimate uses – in order to foster widespread copyright piracy.



- **ThePirateBay.se** (Sweden);<sup>22</sup> **Kat.ph** (formerly **Kickasstorrents.com**);<sup>23</sup> **IsoHunt.com** (Canada);<sup>24</sup> **Extratorrent.com** (Ukraine);<sup>25</sup> **Torrentz.eu**;<sup>26</sup> and **Rutracker.org** (Russia);<sup>27</sup> are examples of 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.
- **Putlocker.com** (United Kingdom);<sup>28</sup> **Netload.in** (Germany); **Simdisk.co.kr** (and other “webhards” in Korea); **Turbobit** (Germany);<sup>29</sup> **4Shared.com** (registered in the British Virgin Islands);<sup>30</sup> **Ex.ua** (Ukraine);<sup>31</sup> and **Depositfiles**,<sup>32</sup> are examples of “one-click hosting sites,” colloquially referred to as cyberlockers, which provide access to large libraries of infringing files.
- **vk.com (vKontakte)** (Russia) is a Russian social networking site that 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.<sup>33</sup>
- **1channel.ch** (formerly **letmewatchthis**) (Estonia);<sup>34</sup> **Movie2k.to** (Romania);<sup>35</sup> **Zing.vn** (Vietnam);<sup>36</sup> **Seriesyonkis.com** (Spain);<sup>37</sup> **Sohu/Sogou** (China);<sup>38</sup> **Warez-bb.org** (currently hosted either in Russia or hidden

<sup>22</sup>Swedish-based *ThePirateBay.se* is ranked as the 73rd most visited site in the world according to Alexa.com, the 14th most visited site in Sweden, and the 18th most visited site in the Philippines; it is one of the top 50 websites visited in 17 countries. *ThePirateBay* is a BitTorrent site with a global scope. The site remains hosted in Sweden, despite criminal convictions against the four founding individuals in April 2009 (appeal upheld in November 2010). The site has over 30 million users and access to pirate versions of the world’s most popular films and music for instant download. Right holders have turned to ISPs in other countries for cooperation in respect to enforcement, and have received some good cooperation. However, the operators of the site have practiced evasive tactics to ensure the site remains open for its illegitimate business.

<sup>23</sup>*Kat.ph* is currently ranked as the 119th most visited site in the world by Alexa.com, and the 30th most visited site in the Philippines.

<sup>24</sup>*IsoHunt*, operating out of Vancouver, Canada, is one of the largest BitTorrent sites in the world, with millions of users monthly, providing popular music and films available for instant download illegally. In December, 2009, a U.S. federal district court found *IsoHunt* liable for massive copyright infringement, finding that its business model “depends on massive infringing use,” and citing un rebutted evidence that 95% of the files traded through *IsoHunt*’s sites are likely infringing. In May 2010, the court issued an injunction that *IsoHunt* ignored, and criminal contempt proceedings were initiated. The website has shown only isolated signs of cooperation, and continues to operate through servers operated by *Isohunt* in Canada.

<sup>25</sup>Ukraine-based *ExtraTorrent.com* claims it is “The World’s Largest BitTorrent System,” and claims, “Any torrents for FREE download. Download music, movies, games, software, iPod, anime, porn, adult, books, pictures and other torrents.” It is particularly popular in South Asia, coming in, for example, as the 76th most visited site in all of India, according to Alexa.com.

<sup>26</sup>Torrentz.eu is ranked the 175th most popular site in the world, according Alexa.com.

<sup>27</sup>Russia-based *Rutracker* was recently ranked by Alexa.com among the 14 most visited sites in Russia, number 18 in Ukraine, 19 in Belarus, and 25 in Latvia. The site allows for the fast identification and download of pirated content.

<sup>28</sup>*Putlocker.com* is particularly popular throughout Europe.

<sup>29</sup>*Turbobit*, hosted at Leaseweb, ranks 165th in Russia in terms of Internet popularity. It is the 70th most visited site in Turkey, and is popular in the Middle East and North Africa.

<sup>30</sup>*4shared* is ranked as the 118th most visited site in the world according to Alexa.com Internet traffic rankings. The site is in the top 25 most visited sites in Brazil (25), Indonesia (17), Saudi Arabia (24) and throughout the Middle East, and is very highly ranked in terms of visits in Thailand (34th most visited site), Egypt (35), and United Arab Emirates (37).

<sup>31</sup>Although *Ex.ua* has been subject to criminal action and was temporarily shut down in January 2012, it is now back up and running and the criminal case has been closed without explanation. According to Alexa.com rankings, the site is the 13th most popular website in Ukraine. There are approximately 1,160,000 visitors to the site every day and approximately 386,300 new uploads every day. Notice and takedown is ineffective because within days after an infringing link is taken down, a new link with the same content reappears.

<sup>32</sup>*Depositfiles.com* is currently the 190th most visited site in the world, and is in the top 100 sites visited in seven countries, including Russia (65), Egypt (68), Chile (75), and Mexico (77). The domain is registered by a company in Seychelles; Alexa.com indicates the site is located in Cyprus. Depositfiles generates revenue from advertising and by offering “premium accounts.” Users are also able to pay for premium access allowing them to download files more quickly and further to download up to 250 files simultaneously. The site also offers bonus or affiliate programs rewarding users whose friends download their files. Depositfiles has been subject to legal action for infringement, but remains in operation.

<sup>33</sup>*Vk.com (vKontakte)* is currently the 25th most visited site in the world, according to Alexa.com rankings, the number one site visited in Belarus, the 2nd most visited site in Russia and Ukraine, and the 4th most visited site in Kazakhstan. It has in excess of 80 million registered users and web monitoring companies report that 35 million unique Russian users visit the site every month. The site was found civilly liable for copyright infringement in early 2012 in a case brought by a Russian record label, Gala Records, but this has had no impact on the way that *vKontakte* conducts business, and the site continues to enable members to infringe on a massive scale.

<sup>34</sup>*1channel.com* (previously *Letmewatchthis.com*) is a particularly popular linking site in Canada (62), the UK (73), Ireland (77), and Denmark (97) according to Alexa.com.

<sup>35</sup>*Movie2k.to* is particularly popular in Germany (20), Austria (35), Switzerland (61), and the Philippines (61).

<sup>36</sup>*Zing.vn* remains an extremely damaging site in Vietnam, ranking as the 6th most visited site in that country, and is often visited from South Korea and elsewhere in the Asia-Pacific, giving it a strong global ranking.

<sup>37</sup>*SeriesYonkis* moved up to the 49th most visited site in Spain and is strong generally (in the top 200) in many Spanish-speaking countries. It is a dedicated linking “streaming” site for infringing first-run movies and television content.

<sup>38</sup>*Sohu*, which is the parent company of *Sogou*, continues to operate an unlicensed deeplinking service called “Sogou MP3” (*mp3.sogou.com*). According to Alexa.com rankings, *Sohu* is now the 9th most accessed site in China, the 54th most visited site in South Korea, the 55th most visited site in Hong Kong, and the 54th most accessed site globally; *Sogou* is not far behind, ranking 17th in China, 20th in South Korea, 30th in Hong Kong, and 133rd in Taiwan; it ranks 88th globally. *Sogou MP3* provides users with access to deep links of music files from unauthorized sources for streaming and download. Despite court judgments against the search service in 2010, *Sogou* has not taken meaningful steps to remedy the infringement. *Sohu* has a built-in *Sogou* search field in a prominent position on *Sohu*’s

behind a proxy server);<sup>39</sup> and **BaixedeTudo** (Brazil),<sup>40</sup> are linking sites that aggregate, organize and index links to infringing files stored on other sites (so-called deeplinking). Linking sites typically organize illegal copies by title or genre. Depending on the website, users are commonly presented with the option to either stream the content in a video-on-demand format or download a permanent copy to their computer. Coca-Cola and Samsung stopped advertising on Zing.vn in October 2012.<sup>41</sup>

- **Xiami** (China);<sup>42</sup> and **Blubster** (Spain),<sup>43</sup> are examples of sites operating P2P file sharing services encouraging infringement, especially of music files (but increasingly these are multi-platform sites).
- **Usenext.com** (Germany) is an example of a “Usenet” service, but with the difference that its proprietors offer search functionality which encourages infringement and offers significant speeds of download for large files like infringing motion pictures. Even though Usenet notices result in takedown from the global usenet, infringing content remains on the “closed” Usenext system.
- **Extabit.com** (Netherlands)<sup>44</sup> is a download hub (hosting unauthorized copyright material for download) particularly popular in Southeast Asia and South Asia. Earlier this summer, payment provider PayPal stopped handling payments for the company.

The significant challenges of online piracy require a multi-faceted approach, but some of the solutions are quite straightforward. Governments 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;<sup>45</sup> provisions recognizing online piracy as a form of cybercrime;<sup>46</sup> and provisions that foster cooperation among the stakeholders (including ISPs) involved in the online supply chain to combat online infringements.<sup>47</sup> Effective 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. Increasingly, the role of advertising and ad networks in sustaining notorious piracy websites has come under scrutiny.

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website and infringement can be found otherwise through *Sohu's* platforms. The takedown rate by *Sohu* and *Sogou* remains extremely low at 1%. Although administrative complaints were filed against *Sohu* and *Sogou*, no sanction resulted and the Government authority has failed to provide an explanation for this. According to *Sohu's* 2012 half year results, *Sogou* revenues were US\$30 million, up 123% year-on-year and 34% quarter-on-quarter.

<sup>39</sup>*Warez-bb.org* remains a popular site in certain countries in South Asia and Oceania.

<sup>40</sup>*BaixedeTudo's* English translation is “download everything” and “comscore” estimates site has more than 1.2 million unique users per month. While the site is hosted in Sweden, it targets the Brazilian market. The site also provides distribution of hacked or cracked software codes and programs.

<sup>41</sup>Chris Brummitt, *APNewsBreak: Coke, Samsung Pull Vietnam Site Ads*, Associated Press, October 3, 2012, at <http://bigstory.ap.org/article/coke-samsung-pull-ads-vietnam-website-citing-concerns-over-unlicensed-music-downloads>.

<sup>42</sup>*Xiami.com*, a Zhejiang Province-based company, continues to operate its multi-platform infringing service in music portal, P2P application (“XiageShark,” through which users are encouraged to upload infringing music), and mobile applications that actively induce users to search for infringing music files hosted on *Xiami's* servers for streaming and download. *Xiami's* music portal is searchable and categorized by language (including Cantonese, Mandarin, English, Japanese, Korean, French, and German), by origin, by genre, and by mood. The site is now ranked 911th in the world in terms of Internet traffic and 132nd in China (and is popular in Taiwan).

<sup>43</sup>*Blubster* is a music-dedicated P2P service run out of Spain. A statistical analysis has confirmed that the vast majority of music being shared on the service is infringing. *Blubster* has a decentralized structure and no central indexing server, but it is operated by a group of companies and is not open source. The operators generate income through advertising and through sales of advertising-free client software. Spanish record companies brought legal proceedings in April 2008; the case has unfortunately suffered from lengthy delays and difficulties involving the initial judge sitting on the case. A new judge decided the case without having presided at the hearing, delivering judgment in November 2011, and dismissing the Spanish music industry group's claims in their entirety. A decision on appeal is awaited.

<sup>44</sup>*Extabit* ranks very high in terms of number of visits in South Asia, Southeast Asia, and Latin America, giving it a relatively high global ranking.

<sup>45</sup>This should include express recognition of protection of reproductions in the online environment, regardless of their duration (i.e., temporary as well as permanent copies capable of being further copied, communicated, or perceived should 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. Currently, there are 90 members of the WCT and 91 members of the WPPT.

<sup>46</sup>Governments 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.

<sup>47</sup>Many governments, particularly in Asia and Europe, have recognized the need for urgent steps to curb online piracy, and while not all approaches are favored by all the content industries equally, the goal is the same: to ensure effective action is available in practice against online piracy. There is consensus that bad actors who cause massive harm or profit from their direct involvement in the online infringing supply chain should be held responsible. There is also general agreement that all stakeholders in the online supply chain, including service providers, should have proper incentives to cooperate to eradicate bad behavior, which has traditionally included notice and takedown, and which at least includes effective and fair mechanisms to deal with repeat infringers in the non-hosted environment. The fact is that momentum is building for workable solutions and all recognize that solutions are required and desirable.



Some companies have made the right choice and decided to take affirmative steps to terminate such practices—at least in part.<sup>48</sup> However, more often than not, such companies are entirely unaware that their advertisements appear on sites that facilitate access to infringing content. It is imperative that the ad networks that contract with site operators to feed ads on their sites make ethical business decisions. We applaud those who have already done so, and urge all the responsible participants in the online advertising ecosystem to act to ensure that such websites do not benefit from their advertising activities.<sup>49</sup>

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

The unauthorized use of software within enterprises, also referred to as “enterprise end-user software piracy,” remains a highly damaging form of infringement to the software industry today. In the most typical examples, a corporate (or governmental) entity either uses pirated software exclusively, or else purchases one or a small number of licensed copies of software and installs the program on multiple computers well beyond the terms of the license. Client-server overuse, another common example of end-user piracy, occurs when 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 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.<sup>50</sup> 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 prosecutions,<sup>51</sup> in order to reduce piracy of software. The adoption of pre-established (statutory) damages for copyright infringement is also needed in many countries to provide predictability, encourage settlements, and provide “remedies which constitute a deterrent to further infringements,” as required by TRIPS Article 41.<sup>52</sup>

Enterprise end-user software piracy by government agencies remains a serious and widespread problem. In addition, in many countries, governments are using a high volume of unlicensed software in their own operations. Since the government is often a major, and in some cases the largest, buyer of software in many countries, this has a tremendous impact on sales of legitimate software. It also undermines the credibility of government enforcement efforts against software piracy and sets a bad example for private enterprises to follow. Moreover, the use of unlicensed software creates security vulnerabilities and risks for government agencies. Government software legalization problems are documented in the accompanying reports for many countries. China and Ukraine are notable examples:

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<sup>48</sup>The Vietnam website *zing.vn*, a notorious marketplace for online piracy as identified by IIPA and USTR, enjoys advertising from major Fortune 500 corporations, but some have chosen to divest, a move which IIPA applauds. Chris Brummitt, *APNewsBreak: Coke, Samsung Pull Vietnam Site Ads*, Associated Press, October 3, 2012, at <http://bigstory.ap.org/article/coke-samsung-pull-ads-vietnam-website-citing-concerns-over-unlicensed-music-downloads>. In deciding to divest from Zing, Samsung said, “We highly respect and value intellectual property rights, and stand against acts of infringement, such as the unauthorized copying and distribution of copyrighted material. ... Accordingly, our advertisements on Zing.vn have been withdrawn.” Coca-Cola said it had stopped advertising on the site and would “investigate their practices before making further decisions.” Other multinationals that have advertised on Zing include Canon, Yamaha, Intel, and Colgate Palmolive.

<sup>49</sup>Jonathan Taplin, Director of the USC Annenberg Innovation Lab, released the first study on Online Ad Networks’ support of the major pirate movie and music sites around the world. See USC Annenberg Innovation Lab, Annenberg Innovation Lab *Research Study Demonstrates Relationship Between Online Advertising & Pirated Film, Music and Video Content*, January 3, 2013, at [http://www.annenberglab.com/adminfiles/files/USCAnnenbergLab\\_AdReport\\_Jan2013.pdf](http://www.annenberglab.com/adminfiles/files/USCAnnenbergLab_AdReport_Jan2013.pdf). In part, the data on ad sites of infringing sites was compiled by reviewing Google’s list of sites which, anecdotally, were the subject of the most takedown requests by stakeholders using its notice and takedown protocol. Data regarding those sites can be found at <http://www.google.com/transparencyreport/removals/copyright/domains/?r=last-month>.

<sup>50</sup>For example, China’s 77% PC software piracy rate means that Chinese enterprises competing with U.S. firms pay on average for just over one out of five copies of software they use, while their U.S. counterparts (the US has a 19% PC software piracy rate) pay on average for more than four out of five copies.

<sup>51</sup>TRIPS Art. 61 requires that this remedy be available against corporate end-user piracy.

<sup>52</sup>The U.S. has the lowest software piracy rate in the world and this is due in large part to the deterrent impact of infringers knowing that right holders can avail themselves of statutory damages.



- **China:** The Chinese government has made numerous bilateral commitments to the U.S. and issued directives to ensure legal software use in government agencies at all levels (central, provincial, municipal, county). This has led to incremental progress in terms of software sales to the government. We urge the Chinese government to build on these initial efforts and implement a comprehensive legalization program for government agencies that encompasses all types of software and utilizes software asset management best practices.
- **Ukraine:** The Ukrainian government has also made bilateral commitments to the United States and issued directives to combat unlicensed software use in the government but to date has taken woefully inadequate steps toward this result. This is one reason IIPA has recommended designation of Ukraine as a Priority Foreign Country.

Government software legalization is also a problem in countries not covered by the IIPA Special 301 report. For example, in **Korea**, the government agreed to specific obligations on government software legalization in the Korea-U.S. Free Trade Agreement (KORUS), yet as noted in a later section, there remains a significant problem with particular Korean government ministries not taking steps to resolve the issue of substantial unlicensed software use.

The principal way to address unlicensed software use in the government is through comprehensive government software legalization programs that utilize software asset management best practices. In countries having significant state-owned enterprise sectors (China being just one example), this problem is compounded. Therefore, it is also critical that governments vigorously pursue legalization of software within state-owned enterprises as well. Governments should also take steps to ensure that businesses that provide goods and services under government contracts do not use unlicensed software.

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

#### **4. Unauthorized Loading onto PCs (Hard-Disk Loading), Mobile Devices (Mobile Device Piracy) and “Media Boxes”**

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.<sup>53</sup> 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 device<sup>54</sup> of virtually any kind of copyrighted material.

Another relatively recent phenomenon involves the manufacture, distribution, and use of “media boxes” which facilitate massive infringement. These media boxes are generally manufactured in China and exported to overseas markets, particularly throughout Asia. These media boxes can be pre-loaded with 200 HD motion pictures prior to shipment, loaded upon delivery, or plugged directly into Internet-enabled TVs, facilitating easy access to remote online sources of unauthorized entertainment content including music, music videos, karaoke, movies, TV dramas, and other creative materials. Such media boxes are available in China, Malaysia, Singapore, and Taiwan. Enforcement authorities must take effective action against these forms of piracy or losses will mount out of control.

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<sup>53</sup>Mobile penetration is over 100% in 97 countries, and had reached 70% in the developing world, according to International Telecommunications Union (ITU), *Newsroom • ITU StatShot*, August 7, 2011, at [www.itu.int/net/pressoffice/stats/index.aspx?lang=en](http://www.itu.int/net/pressoffice/stats/index.aspx?lang=en).

<sup>54</sup>Cell phones, mp3 players, external hard disks, thumb drives, flash drives, or USB drives are all illegally loaded in this fashion.



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

Today, more consumers enjoy authorized access to more copyright works in more diverse ways, and at more affordable price points, than ever before. A major contributor to this progress is the widespread use of technological protection measures (TPMs) to control and manage access to copyright works. Myriad innovative products and services are currently made available in connection with works protected by TPMs, and new business models that depend on such controls are emerging and being extended to new markets constantly. TPMs also ensure that works made available in 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 use TPMs that play an increasingly large role in the dissemination of creative content, or 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,”<sup>55</sup> “game copier,”<sup>56</sup> and software and technologies used for “soft modding” facilitate piracy on game console platforms and require strong legal measures and enforcement to make space for the sale of legitimate games.

While implementation of TPMs protections has given rise in those countries properly implementing them to effective enforcement actions against distributors of unlawful circumvention technologies, these efforts are critically undermined by countries that have yet to implement or do so adequately. Countries that lack TPM provisions 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, especially immediately after a title’s theatrical exhibition window opens. An unauthorized recording may include a video capture, an audio capture, or both. Approximately 90% of newly released movies that are pirated can be traced to thieves who use a digital recording device in a movie theater to steal the audiovisual work (whether image or sound or both) from the theater screen. The increase in the severity of this problem in recent years tracks the development of camcorder technology that makes detection difficult and copies nearly perfect. All it takes is one camcorder copy to trigger the mass reproduction and distribution of millions of illegal Internet downloads and bootlegs in global street markets just hours after a film’s theatrical release and well before it becomes available for legal home entertainment rental or purchase from legitimate suppliers.<sup>57</sup>

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 2012, MPAA identified 791 total illegal recordings of its member company titles from cinemas around the world, including 280 video captures and 511 audio captures. This number does not include the numerous independent or local country films illegally camcorded, and these producers also suffer gravely from illegal camcording.

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<sup>55</sup>There is a global market for modification chips (mod chips) sold on the Internet and in videogame outlets which, when easily installed into a console (by the user or by the pirate retailer) will bypass the handshake and allow the play of pirated games.

<sup>56</sup>“Game copier” devices also bypass TPMs to allow for uploading, copying, and downloading of games for handheld platforms.

<sup>57</sup>Independent film producers who coordinate release patterns with dozens of national distributors may be especially vulnerable to this type of piracy.



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, and effective anti-camcording laws have now been adopted in Canada, Japan, Korea, Malaysia, the Philippines, and the United States. 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.<sup>58</sup> It is clear that if laws creating a separate offense for camcording are not adopted and deterrent penalties are not applied, this crippling source of 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;<sup>59</sup> sophisticated infringing offset print versions of books (essentially akin to counterfeiting); and unauthorized translations of popular books.<sup>60</sup> Photocopy piracy in most countries involves unauthorized commercial copying of entire textbooks by copy shops on and around university campuses, often undertaken on a “copy-on-demand” basis to avoid stockpiling. Book pirates have shifted tactics and are increasingly electronically storing digitized files of books (academic or otherwise) and fulfilling customer requests on a “print-to-order” basis. 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 scanning and printing technologies result in extremely high-quality pirate editions of books, making it difficult for users to distinguish between legitimate and pirate products.

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

## 8. Optical Disc and Game Cartridge Piracy

While piracy is migrating to the online space for most of the content industries, physical piracy, including optical disc (OD) products,<sup>61</sup> 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 should continue, and where unlicensed illegal activity is detected, copyright laws and specialized OD laws or regulations should be enforced. Similarly, unauthorized factory production of entertainment software in cartridge format persists in China, for export

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<sup>58</sup>*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 Vietnam. Asia-Pacific Economic Cooperation, *Member Economies*, at <http://www.apec.org/About-Us/About-APEC/Member-Economies.aspx>.

<sup>59</sup>Pirate photocopying takes place in a variety of venues, including commercial photocopy shops located on the perimeters of university campuses and in popular shopping malls, at on-campus copy facilities located in academic buildings, libraries and student unions, and in wholly illicit operations contained in residential areas or other underground establishments. Some of these operations are highly organized and networked, and technological advances are making the problem worse, since the shift from physical copy machines to electronic files means shops can print infringing books on demand. Publishers also suffer from unauthorized institutional or business-related photocopying for commercial research (often accompanied by failure to compensate right holders through collective means or otherwise for copies made).

<sup>60</sup>This 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.

<sup>61</sup>OD include formats such as compact discs (CD), video CDs (VCD), CD-ROMs, CD-Recordables (CD-Rs), digital versatile discs (DVDs), DVD-Recordables (DVD-Rs), universal media discs (UMD), and high-definition formats such as Blu-ray.



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 waned as technological developments have meant fewer large-scale factories, replaced by smaller, more agile operations that “burn” music, books and reference publications, games, movies, and business software onto recordable media. Nonetheless, high-quality counterfeit DVDs, Blu-ray discs, and elaborate box sets continue to be manufactured in China and find markets in Southeast Asia, with unlikely entry points such as into Thailand from Cambodia and even Myanmar. 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, television content, and music and sound recordings, costs right holders dearly. 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, a problem of growing severity in several countries in the Caribbean region. 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 been effective in some countries in 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 curtail it. 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. Implementation of IPR Provisions in Trade Agreements**

The negotiation of multilateral trade agreements (such as the WTO TRIPS Agreement), as well as regional and bilateral free trade agreements (FTAs) or Trade Promotion Agreements (TPAs) over the past two decades, has proven to be of great value to the U.S. economy, and has included the introduction and implementation of enforceable obligations for our trading partners to modernize their copyright law regimes and improve enforcement procedures. These agreements have helped U.S. copyright industries to compete fairly in foreign markets, and have helped our trading partners develop their domestic copyright industries, a true win-win for all parties. In addition to TRIPS implementation, which has been completed in virtually all countries/territories that are members of the WTO, at the time of this submission, FTAs with 20 countries had entered into force. On March 15, 2012, the U.S.-Korea FTA (KORUS) entered into force. On May 15, 2012, the U.S.-Colombia TPA entered into force. On October 31, 2012, the U.S.-Panama FTA entered into force.

The pending negotiations for a TPP FTA present an opportunity to expand the benefits of existing FTAs to a broader range of markets around the Pacific Rim. The governments of Canada and Mexico officially joined the TPP negotiations during the 15th round in Auckland, New Zealand in December 2012, bringing the total number of countries



negotiating the agreement to eleven.<sup>62</sup> IIPA members believe that the TPP IP text should use the now-in-force KORUS 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, increased exports, and economic recovery in line with the Administration's goals.

IIPA takes notice of the following countries for issues related to their bilateral, regional, or multilateral obligations in the area of intellectual property rights.

- **Colombia:** On May 15, 2012, the United States-Colombia TPA went into force. 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 2013 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.
- **Korea:** IIPA members were strong supporters of KORUS due to the strong commitments made in the IP chapter on which industry believes the U.S. government can further build in the TPP and other new, 21st century trade agreements. One important aspect of the IP chapter was the commitment Korea made to ensure that its central government agencies would utilize legitimate software. However, software industry representatives have raised concerns about significant under-licensing of software by certain ministries, and the Korean government has to date not taken sufficient action in response to these concerns. For example, auditing appears not to follow best practices in many circumstances and to be nonexistent in others. Korea also fails to provide adequate funding for at least some Korean agencies to purchase the software they actually use. U.S. industry has tried to work with individual ministries, such as Korea's Ministry of Defense, to address problems of substantial under-licensing, but so far without success, despite Korea's KORUS obligations and the value of eliminating piracy to advance public security. IIPA will be closely monitoring this issue in Korea and will consult closely with the US government on means to address it. In addition, industry looks forward to working with the U.S. government to ensure that trade agreement obligations related to government software legalization are further strengthened, in the TPP and other future trade agreements, to give industry enhanced protection and recourse to deal with shortfalls in meeting these obligations.
- **Peru:** The United States-Peru Trade Promotion Agreement (PTPA) entered into force on February 1, 2008. Peru was afforded transition periods to come into compliance with some provisions of the PTPA, but those transition periods have expired as to Peru's outstanding obligation to provide statutory damages (which expired September 1, 2009, per TPA Article 16.11.8) and obligations related to service provider liability (which expired February 1, 2009, per TPA Article 16.11.29). Meanwhile, Peru now has the worst problem of unauthorized camcording of U.S. motion pictures in all of Latin America. IIPA appreciates the cooperation of the Peruvian government in trying to address the camcording problem, and calls upon the government to work to effectuate changes to fully implement its PTPA obligations.
- **Singapore:** While the copyright law and enforcement provisions of Singapore's FTA with the United States, which came into force in 2005, have been largely successful, several significant shortfalls remain. Online piracy continues to threaten Singapore's market for copyright works, especially music, movies, and television programs. The government has thus far refused to bring public prosecutions of online music pirates<sup>63</sup> or to bring Internet service providers into a cooperative stance with right holders to combat online piracy. Both these shortfalls, in addition to

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<sup>62</sup>TPP negotiating countries now include Australia, Brunei Darussalam, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam.

<sup>63</sup>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."



some others (e.g., 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) raise FTA compliance issues. Singapore should also 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.

- **Antigua and Barbuda:** In January 2013, the government of Antigua and Barbuda sought and obtained from the World Trade Organization (WTO) approval to cross-retaliate against U.S. intellectual property rights worth \$21 million a year as a remedy in an unrelated trade dispute. IIPA is of the firm view that suspending intellectual property rights is not the right solution, and that state-sanctioned theft is an affront to any society. Should the government of Antigua and Barbuda determine to move forward in this manner, it would be in violation of its obligations under international instruments not administered by the WTO (e.g., the Berne Convention), and would – by definition – fail to provide adequate and effective IPR protection as required under U.S. trade laws governing unilaterally-granted trade benefits such as CBI. In the event that Antigua and Barbuda proceeds in this manner, we believe that the U.S. should take appropriate, immediate and robust action to uphold U.S. trade laws.

## 11. **Implementation of the WCT and WPPT, and Ongoing Work at WIPO to Promote Robust Intellectual Property Protection**

The WCT and WPPT, in force since 2002, provide a basic legal framework for the protection of online copyright. The WCT now has 90 adherents, while the WPPT now has 91 adherents. 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 New Zealand and Israel among developed countries, and Thailand among developing countries, have not yet either ratified or implemented these treaties. The United States, which was one of the first countries to implement these changes in its laws more than a decade ago, should continue to make it a priority to encourage other countries to follow this path.<sup>64</sup>

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.

In the more than 16 years since the adoption of the WCT and WPPT at WIPO in Geneva, WIPO has taken some steps to encourage its members to join and implement the treaties, but more should be done, particularly in light of the conclusion of a Diplomatic Conference on the adoption in June 2012 of the Beijing Treaty on Audiovisual Performances (BTAP). The U.S. government should now take all steps to urge WIPO to encourage its members to adopt the WCT and WPPT as essential forerunners to the newly concluded BTAP. WIPO should also be encouraged to continue its important work in the Copyright Infrastructure Division to measure the contribution of copyright industries to national economies, and in addition, to commence measuring the impact of piracy in WIPO members.

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<sup>64</sup>The United States implemented the WCT and WPPT by enacting Title I of the Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998). The United States deposited instruments of accession for both treaties on September 14, 1999.

## 12. Market Access Barriers

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

- ownership and investment restrictions on copyright-related businesses;
- discriminatory or onerous content review/censorship systems;<sup>65</sup>
- discriminatory restrictions including on the ability to fully engage in the development, creation, production, distribution, promotion, and publication of copyright materials;
- the maintenance of quotas including screen time and broadcast quotas or complete bans on broadcast of foreign programming or advertising;
- periods during which governments prevent U.S. producers from opening their films, or onerous restrictions on the window for theatrical distribution (including booking competing motion pictures simultaneously or unfairly shortening the run of a theatrical motion picture);
- local print requirements;
- onerous import duties or the improper assessment of duties on an *ad valorem* basis;<sup>66</sup> and
- government procurement preferences for domestic products or those with locally-owned or locally-developed IP.<sup>67</sup>

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

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

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## E. CONCLUSION

The health and competitiveness of the U.S. economy depends on a thriving copyright sector that creates 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

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<sup>65</sup>In China, for example, music and 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 music and videogame products. Further, while piracy enters freely in these markets, countries like China and Vietnam impose content review processes which clear the way for further piracy and, adding insult to injury, are discriminatory to foreign content, further skewing the playing field.

<sup>66</sup>*Ad valorem* duties are based on potential royalties generated from a film rather than the accepted practice of basing duties on the value of the carrier medium (i.e., the physical materials which are being imported). 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.

<sup>67</sup>As 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, including at the U.S.-China Joint Commission on Commerce and Trade (JCCT) and the U.S.-China Strategic and Economic Dialogue (S&ED), to eliminate such policies that link government procurement to where IP is owned and developed.



actions, to bring real commercial gains to the United States through strengthened copyright and enforcement regimes worldwide.

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

Respectfully submitted,

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# UKRAINE

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Ukraine be designated a Priority Foreign Country (PFC) in 2013, as a result of very severe enforcement problems, as well as numerous longstanding legal deficiencies.<sup>1</sup> In addition, IIPA recommends that the U.S. Government immediately suspend or withdraw Ukraine's eligibility to continue receiving Generalized System of Preferences (GSP) benefits, regardless of its designation under Special 301.

**Executive Summary:** There are many examples of copyright enforcement problems in Ukraine at present, ranging from rampant copyright digital and hard-copy piracy, to governmental decisions related to the operation of collecting societies, to the use of unlicensed business software by government ministries. The issues with collecting societies and software legalization are long-festering problems. On the latter issue, by their own admission and despite claims to remedy the situation, various ministries within the Government of Ukraine (including the Ministry of Interior, the offices of State Tax Service, and the Prosecutor's Office) are continuously and blatantly using unlicensed software. These and other state institutions and governmental entities constitute the largest users of unlicensed software, setting a poor example for the business sector where illegal software use is practically the norm.

Piracy rates are exceedingly high in Ukraine and weak copyright protection has been a long-standing problem there, but in the past two years the situation has substantially worsened. Ukraine is a key country in the region for the enforcement of IPR because it exports piracy, especially digital piracy, into both European Union markets and other countries in the Commonwealth of Independent States (CIS). For example, there are several notorious websites hosted in Ukraine by Ukrainian ISPs that, while identified to Ukrainian enforcement officials, continue to act with impunity. To combat and target the digital piracy problem, in 2010, the Government of Ukraine developed an IPR "Action Plan" in cooperation with the U.S. Government. That plan was never implemented; instead, since the plan was adopted, some actions have been undertaken by Ukrainian officials that are not only contrary to the plan but would actually weaken, not strengthen, enforcement.

One very troubling on going problem relates to the operation of collecting societies. Ironically, while IIPA has long highlighted the problem of rogue societies issuing "licenses" which they lack authority from rights holders to grant, the Government of Ukraine instead decided to act against the legitimate society representing rights holders (UMRL). Although an investigation by the General Prosecutors Office found no wrongdoing by UMRL, the Government of Ukraine removed their accreditation which created tremendous confusion in the Ukrainian marketplace, and denied the ability of rights holders to determine how to license the use of their works. While this process plays out, non-representative collecting societies are "licensing" public performance venues, illegal websites and facilitating widespread digital and hard-copy piracy.

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. 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 free and pay-for-download piracy of music and film, as well as the source of some of the world's top BitTorrent systems. Ukraine also remains a global hot spot for high-quality illegal camcords of films that are uploaded to top sites and distributed across the Internet. In addition to digital

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<sup>1</sup>For more details on Ukraine's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2013SPEC301HISTORICALCHART.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2013 global issues, see our cover letter at <http://www.iipa.com/pdf/2013SPEC301COVERLETTER.pdf>.



piracy, 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.

IIPA members appreciate that a multi-national effort to stop the operations of demonoid.me is still ongoing, including actions in August 2012 by Ukraine enforcement officials against a server located in Ukraine. IIPA and its members are closely following the progress of the criminal case in Mexico, Ukraine and Panama, and hope that a proper criminal investigation will quickly commence and proceed accordingly. While the actions that began over a year ago in Mexico and are now proceeding in Ukraine are a positive step, this is but one of many illegal Internet distribution services in Ukraine that should be addressed—most notably, ex.ua which is back in operation after the highly publicized raid last year, and which has resumed its role as a primary hub for the distribution of infringing materials.

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 testified at a U.S. Government hearing on this petition in September 2012. Because of the serious and unabated problems of piracy in Ukraine, IIPA recommends that the petition be accepted and that GSP benefits be immediately suspended or withdrawn so that Ukraine does not receive these trade preferences until it properly and completely addresses its piracy problem.

## **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 2013:

### **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: (1) coordination by key agencies – including, the Ministry of Internal Affairs and General Prosecutors Office; (2) a significant increase in the number of raids and prosecutions; and (3) additional resources, especially for IPR police enforcement personnel (bringing the force up to at least 250 officers). IIPA recommends that effective criminal enforcement, including prosecutions and deterrent sentencing, should be directed at:

- Owners of the numerous free and pay-per-download and streaming film and music sites, as well as BitTorrent sites. Criminal enforcement authorities should be using existing laws to 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 from rights holders 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.

- Owners of commercial entities who ignore and/or fail to act against end-user (software) piracy taking place in their businesses.

### **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 enforcement against enterprise end-user software piracy 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 of funds dedicated to full software legalization in each ministry (in 2013), and the creation of an effective software asset management policy and practice (including audits) – as set out in the Action Plan. Further, we recommend: (1) the development of (and public statements about) the plan for software legalization; (2) identifying both the steps to be taken to implement the resolution of the Cabinet of Ministers (designating the individuals responsible in the process); and (3) placing the plan's implementation under the Prime Minister's supervision.
- Moving aggressively against copyright-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, in the current parliamentary session, now Bill #0902) was introduced in the Verkhovna Rada in June 2010 and passed its first reading in February 2011, but there has been no progress since that time on adoption of the law. Amendments to the Copyright Law, if properly enacted (i.e., if the draft bill included proposed amendments submitted by rights holders) would improve the Copyright Law and other IPR laws of Ukraine by fixing current deficiencies pertaining to 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. Unfortunately, many of the copyright industries were shut out of the drafting process of Bill #6523 (now, #0902), and, due to a lack of transparency, do not know the details of what any current version contains. Here is the list of the key legal reforms that IIPA recommends:

- Fully implementing 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: (1) legal incentives for ISPs to cooperate with rights holders to effectively deal with Internet piracy; (2) rules that clarify the illegality of providing services that are intended to promote the infringement of copyright and related rights or that facilitate such infringement (including knowingly and intentionally providing links to infringing content); and (3) injunctive relief and a duty on Internet service providers (ISPs) to provide information to law enforcement agencies and rights holders. Additionally, Copyright Law amendments should 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.
- Amending 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, as well as remedies against

repeat infringers (even if each separate infringement is below the criminal infringement threshold); and, to establish in the Criminal Procedure Code, clear rules for prosecuting infringers.

- Amending 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 the local production of film prints.
- Implementing the 2003 resolution of the Cabinet of Ministers regarding legalization of software in state agencies – as required in the Action Plan.
- Amending the Copyright Law, the Civil Code, and regulations, to ensure that all relevant rights holders are entitled (in law and practice) to operate effectively through the collecting bodies of their choice (based on a criteria of “volume of rights” in active use) in the licensing of broadcasting, public performance and other communications to the public.
- Abolishing the hologram sticker system (or, at the very least, fixing it so that it cannot be used by infringers to make pirate product appear legitimate) – as required in the Action Plan. One draft proposal circulated in December 2012 would revise the hologram sticker system for videogames and software.

In January 2013, the State Intellectual Property Service of Ukraine (SIPSU) proposed a new set of copyright amendments, focusing on provisions pertaining to collective rights management. Unfortunately, the proposal would deny rights holders control over the management of their basic rights by collecting societies, and would unfairly usurp their rights of public performance, broadcasting and monies from private copying. This draft bill, if enacted, would violate basic international practices and principles of collective administration, and Ukraine’s international obligations.

## **COPYRIGHT ENFORCEMENT IN UKRAINE**

**Internet piracy in Ukraine in 2012:** Internet use is growing fast in Ukraine; it is now estimated that 34.1% 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 June 2012. This places Ukraine as the tenth 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 throughout Europe and the United States. In 2012, Ukraine was fifth in the world in terms of the number of connections by peers participating in the unauthorized file sharing of select Entertainment Software Association (ESA) member titles on public peer-to-peer networks. There are numerous open and notorious sites, and Ukraine has many free and pay-per-download music and video websites, as well as streaming services, some aimed at an international audience. Ukraine is the home of two of the world’s top 15 BitTorrent systems, and there are estimated to be over 21 major hosting sites currently distributing unlicensed material in Ukraine, and abroad. Yet, there was not a single Internet piracy-related criminal conviction in Ukraine in 2012.

The Action Plan was meant to specifically address Internet piracy. The Action Plan 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, including on Internet enforcement issues. But, unfortunately, the Government of Ukraine has not moved to implement the Action Plan and the problems of Internet piracy – in its myriad forms – persist.

One particularly blatant case of piracy is the filesharing site ex.ua, which is estimated to be responsible for half of all the users who upload and download illegally in Ukraine. The site serves as a user storage locker for illegal material to which anyone can gain access to download material; most of the files can be streamed as well, and with BitTorrent files attached, accessed with a peer-to-peer client. For over two years rights holders had gathered and

provided enforcement authorities with evidence of ongoing infringing activity by this site. On January 31, 2012, ex.ua was raided by police and the site was briefly taken down. However, despite the takedown of ex.ua in January 2012, the equipment was subsequently returned, and in June 2012 it resumed full operations and remains in operation a year later. The criminal case (investigation) against the site operators was closed in 2012 without any indictments or other action. In December 2012, ex.ua was listed by the U.S. Government as one of thirty “Notorious Markets” as a part of the Special 301 Out-of-Cycle review, because of the site’s ongoing illegal activity and what the U.S. Government described as its “full range of infringing content.” Other major illegal filesharing sites include fs.ua, which was very active in the short time that ex.ua was taken down, futubox, managed in Ukraine, offering films and TV programming, as well as sumotorrents (a very popular BitTorrent site) hosted in Ukraine.

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 and music. 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 2012, the police did commence some investigations, and a few resulted in prosecutions of LAN operators and two LANs were shut down.

The recording industry reports that free and paid download sites (like mp3fiesta.com, wemp3.com, and newalbumreleases.com, a site hosted in Ukraine) 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 BSA | The 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 rights 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 takedown 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 (the Motion Picture Association of America (MPAA) estimates that in 2012, less than 20% of the ISPs responded to takedown letters);

but, most refuse rights holders requests and demand court orders. It has been over four years since IAU agreed to work more forcefully with rights holders to reach a mutually acceptable solution to help stem Internet piracy, but these efforts stalled, which is why IIPA strongly recommends that the Government of Ukraine 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 (Bill #3271) were proposed but ultimately defeated; they were intended to assist the police in conducting Internet crime investigations by providing subscriber information. The 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. IIPA recommends the adoption of guidelines and more effective procedures for police, prosecutors and judges for these crimes. In May 2012, a special police cyber crime unit was created (with IP officers from the Economic Police) for the purpose of combating Internet crimes. While this is a positive development, more steps need to be taken to overcome the enforcement obstacles (as the closing of the case against ex.ua and the absence of supporting legislation, indicate).

**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 pirated product alongside legitimate product. Often times these pirated goods bear wrongly issued holograms which legitimizes the product and makes enforcement challenging. In December 2012, the Petrovka market in Kiev was listed by the U.S. Government as one of thirty Notorious Markets as a part of the Special 301 Out-of-Cycle review because of its ongoing illegal activity; the U.S. Government described that market as containing “300 stands that sell pirated and counterfeit goods, including music, films, games, software...”

It was reported that the police undertook about 280 raids against open markets and street stalls in 2012, about the same as in 2011. The copyright industries report, that for example, the “7-Kilometer” market in Odessa has 80 to 90 stalls selling pirate audiovisual product, the Mayak market in Donetsk has 200 such stalls, and the Petrovka market in Kiev has about 50 such stalls; the Barabashovo market in Kharkov has about 60, but because it is near a railway crossing point into Russia, it 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.

The camcording of motion pictures and the quick transference of these illegal copies on the Internet is still a problem for the motion picture industry; it is mostly undertaken by criminal syndicates operating in Ukraine and Russia. As a consequence, illicit camcording shifts quickly between the two countries resulting in hard copy and Internet piracy. Illicit camcords sourced from Ukraine are quickly uploaded to the Internet and burned to optical discs for distribution. In 2012, as in 2011, some progress was evident in policing this activity as the number of identified video camcords was limited (there were only 2 cases in 2012); however, illegal audio theft – of film soundtracks – which can be later synched and sold with video camcords, was up significantly in 2012, to 17 cases. Amendments to the Copyright Law (Bill #6523, now #0902) 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.

**Software legalization:** Various ministries within the Government of Ukraine (including the Ministry of Interior, the offices of State Tax Service, and the Prosecutor's Office, among many others) are blatantly using unlicensed software. Fixing this problem is part of the 2010 Action Plan, and it is now ten years since the Cabinet of Ministers passed a regulation (in 2003) establishing procedures for the use of software in government agencies. That 2003 regulation 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 the responsible system administrator. In 2004, the government issued a new regulation to implement legalization – assigning all procurement authority for software products to one entity, the State Department of Intellectual Property (SDIP) – now re-named the State Intellectual Property Service of Ukraine (SIPSU), in order to try to eliminate the use of pirated software products in the public sector. However, since then, implementation of the regulation by the government, the largest consumer of illegal software in Ukraine, has stalled. In late 2012, the government budgeted 100 million UAH (US\$12.3 million) for 2013 software legalization in state institutions (this is about 10% to 20% of the monies necessary for proper legalization). But, the government has already announced plans to revise (cut) this budgeted item at the end of the first quarter of 2013; in addition, no cabinet minister has ever been designated to implement a legalization program. Software piracy rates in Ukraine are very high, estimated at over 80%, as it has been for the past five years.<sup>2</sup> IIPA's recommendations on the steps the Government of Ukraine should take to address this problem are set out in the priorities section above. In sum, the Government of Ukraine (including the Rada) does not treat software piracy (by the government or businesses) as a priority problem that needs to be corrected. There are many enforcement failings, including weak or non-existent regulations for inspection orders (raids), evidentiary and prosecutorial procedural failings, and resource needs (including engaging the State Tax Service, as well as customs officials in software audits and prosecutions). The pending draft Copyright Law – with some further improvements as recommended by the software community – could correct some of these problems.

**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 by not undertaking proper actions against organizations which purport to grant "licenses" for which they do not have rights. The rogue or non-representative collecting societies help to support the notorious websites by "licensing" their activities, when they have no authority from rights holders to license any legal, or illegal, distributors.

The proliferation of rogue collecting rights societies – such as Oberih, Avtor, and the newly established (2012) ULASP – 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 SDIP (now re-named SIPSU); 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 (SIPSU). Despite various attempts by non-representative organizations to cancel the results of accreditation (over four years ago), IIPA supported that

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<sup>2</sup>BSA | The Software Alliance's 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Ukraine was 84%, representing a commercial value of unlicensed software of US\$647 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA's 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

accreditation and the reform brought on by Order #1175. Unfortunately, in 2012, a Ukraine court overruled Order #1175 on procedural grounds, which automatically cancelled the accreditation of UMA and UMRL. Currently, there are no authorized collecting societies for producers or performers rights; this has resulted in chaos in the Ukrainian public performance and broadcasting marketplace. Additionally, it has allowed the new rogue collecting societies to prosper in the chaotic market, the most prominent example being ULASP (which purports to represent major recording companies even though it has no such authorization).

IIPA understands that criminal investigations were launched into the activities of Oberih and ULASP, two of the rogue collecting societies. Unfortunately, the investigations have not concluded (and no information about their status has been provided to rights holders). IIPA calls upon the enforcement officials to quickly conclude their investigation and to properly prosecute those responsible for illegal operations (in addition to taking action against other rogue collecting societies, such as Avtor which has licensed pirate websites for years). Last year, U.K. police sent evidence to the Ukrainian police (via Interpol) in order to open a criminal investigation on Avtor, but no action was undertaken. IIPA strongly recommends that SIPSU acts on its existing authority to adopt a proper procedure for the authorized collecting societies for public performances and broadcasting (and that criteria include a volume of the rights of active users, proper and direct governance by rights holders, and an open and transparent accreditation process).

**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 required in the 2010 Action Plan. 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. 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 strongly 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 SIPSU (formerly, SDIP) to publish on its official website information about all current applications for stickers, and to indicate both the names of the applicants as well as the names of all works (CDs and DVDs) seeking labels – this would assist rights holders in tracking applications.

**Broadcast and public performance piracy:** Broadcast television piracy continues to be a major problem for the motion picture, music publishing and recording industries – both with regard to regional and nationwide broadcasts. 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, especially in the absence of authorized collecting societies. IIPA continues to recommend that the Government of Ukraine re-appoint an authorized collecting society for public performances, and that it create a database, inspect commercial users, set a goal to bring these 90+% piracy levels down below 50% in one year (by relying on regional police economic crime units and state IP inspectors), and subject unauthorized users to administrative and criminal prosecutions. The law should, additionally, be clear that wholesale blatant copyright and related rights infringements could lead to station broadcast license suspensions or cancellations from the state. The motion picture industry

reported 19 cases of unauthorized feature film exhibitions (that is, films shown without authorization by a licensed theatrical distributor, and unregistered with the State Cinema Agency). One further troubling development in 2012, was a draft bill that, if enacted, would exempt cable operators from paying any retransmission fees.

**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. The anti-piracy organization (UAPA) reported in 2012 it participated with the police on five criminal cases involving Internet piracy; however, in 16 cases where UAPA filed complaints against pirate sites the police refused to open criminal investigations due to the absence of a crime.

Some of the impediments preventing effective enforcement are statutory or procedural: 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\$1,318 (as of January 2013) 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: (1) the use of expert evidence; (2) treatment of repeat offenders; (3) needed changes in the Criminal Code or Criminal Procedure Code to avoid delays and case dismissals; and (4) the lack of guidelines for judges on sentencing and developing expertise in IPR cases (IIPA recommends that the highest specialized court in civil and criminal cases issue guidelines for judges in this regard). Provisions do exist in the Ukrainian Criminal Code (e.g., Article 28) for prosecuting organized groups or criminal organizations, including for IPR offenses, but these provisions have been under-utilized by prosecutors. One lingering enforcement problem (in criminal and civil cases) is the required proof of ownership (including a complete chain of title), and the denial of standing to licensees (especially of foreign record companies) in court.

Enforcement efforts are further hampered by a lack of resources. The Government of Ukraine established a specialized unit for intellectual property rights crimes within the Economic Crime Division in the Ministry of the Interior. 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; in 2012, a new unit (taken from the Economic Police) was formed to focus on cyber crimes. IIPA continues to recommend that there needs to be more and better resources dedicated exclusively to copyright and related rights violations, and that 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 SIPSU (formerly, SDIP) 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. In 2012, the number of State IP inspectors was increased to 22 inspectors. Other agencies – the State Tax Service and the Security Service – are, unfortunately, not actively engaged in IPR enforcement. On October 17, 2012, a resolution of the plenum (of the highest economic court) was adopted, setting proper IPR civil procedures; as a way of guiding lower courts. This could prove helpful; the same guidelines for criminal court procedures is strongly recommended as well.

**Raids, Seizures and Other Enforcement Actions in 2012:** According to the Government of Ukraine, in 2012 (through October), it seized 296,000 optical discs (down from 700,000 in all of 2011); there were a total of 617 criminal investigations commenced (compared with 960 in 2010), and administrative measures were applied in about

1,838 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 (most fines were from US\$40 to a maximum of US\$400).

The software industry (BSA) reported in 2012, that there were 313 *ex officio* raids – 53 relating to resellers, 214 to commercial end users, 46 to hard disc loaders. These raids resulted in 213 criminal cases commencing (a slight decrease from 2011); of these, 85 cases were sent to the courts for their consideration (an increase from 2011). As in recent years, almost all requests for raids against suspected targets were denied by law enforcement agencies. There were 289 requests by software rights holders against businesses using unlicensed software in 2012; the police initiated (on their own authority) 30 investigations. Most of these investigations targeted small businesses, and most large companies enjoyed immunity from investigation or prosecution (mostly attributable to a lack of political will to make software piracy enforcement a priority).

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 10% to 15% of opened criminal cases end up in court and of those, only 15% result in convictions of any kind. In the majority of cases, courts close proceedings without imposing any sentence, and the remaining cases result in low fines or suspended sentences. 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 74 hard copy cases in 2012, assisting in the seizure of 104,000 optical discs, but, that all of the cases resulted in suspended sentences or probation.

**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, BSA, the Music Association and UAPA) to improve IPR protection, has been wholly ineffective. The regulation and control of the plants that now exists 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. The 2012 changes to the Criminal Procedure Code, which now prevent police from commencing action without rights holder initiation, against optical disc producers (including labs), distributors and sellers, will make enforcement less, not more, effective. There are, at present, eight optical media disc plants (producing CDs, DVDs or both) in operation in Ukraine. In 2011, two criminal cases were commenced against large-scale optical disc producers (who manufactured discs without the required secure identification (SID) codes); those cases are still pending.

**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); further amendments to the Customs Code were adopted in 2012 (in force, June 2012). 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 be reliant on a centralized bureaucracy), and that it be provided with sufficient resources to effectively stop illegal material at the border. Improved border enforcement was also a part of the 2010 Action Plan.

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 rights 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 (Bill #6523, now #0902, would have corrected 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**

IIPA set out its legislative priorities above (“legal reform priorities”) for effective enforcement and full TRIPS compliance, since Ukraine is a member of the World Trade Organization. The 2010 Action Plan sets out legislative steps to improve the Copyright Law and the hologram sticker system. A history of key legal reforms in Ukraine in the recent past 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 enterprise end-user (software) piracy actions. In 2004, the Highest Commercial Court of Ukraine adopted recommendations to implement these procedures. But, 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 serious 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, and the order of the Ministry of Education and Science (Order #1175) which was intended to address this problem, was an administrative fix that cannot substitute for the needed Copyright Law amendments on this matter (as was illustrated in 2012 by a court vacating Order #1175, thus putting the legal framework for proper accreditation in jeopardy).

One positive note: in June 2010 and again in 2012, the highest Economic Court – in resolutions – 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 which should be corrected (Bill #6523, now #0902, would fix this). 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, now #0902): (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, now #0902) that had a first reading in the Verkhovna Rada, included an anti-camcording amendment that would have specifically excluded camcording from the scope of the Copyright Law’s

private copy exception. The law, if enacted, would have prohibited the reproduction of audiovisual works during their exhibition in theatres and at other premises intended for public consumption. IIPA and its members (the motion picture industry (MPAA)) seek urgent consideration and enactment of a law to address this problem.

**Criminal Code and Criminal Procedure Code:** The Criminal Code was completely revised in the past several years, including amendments in 2007 and in 2012 (in force, November 19, 2012). As noted, the threshold for criminal responsibility under Article 176 remains high. IIPA makes the following recommendations: 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 twelve months) would automatically lead to a criminal, and not solely an administrative, prosecution. Last, relevant criminal sanctions should be included in the code for intentional infringements related to the obligation to pay music rights royalties.

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 rights holders to file complaints to initiate actions which acts as a bottleneck to successful enforcement; the 2012 amendments made it a requirement for the initiation of police actions against optical disc producers, lab operators, disc distributors and sellers. Police should initiate, and be able to 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. One positive change in the revised 2012 Criminal Procedure Code is the recognition of legal entities as harmed parties (for the first time); this will allow companies, including foreign rights holders, to seek procedural relief in criminal proceedings.

**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 would be 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 2010, Ukraine agreed to adopt and implement appropriate administrative remedies to deter piracy (in addition to criminal penalties). Proper administrative remedies do now exist but they are not being used effectively to remove the business licenses of infringing retail stores, kiosks, and other smaller scale pirates. Further amendments have been proposed, but never adopted, to increase the maximum fines, which IIPA continues to recommend. 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, now #0902 if enacted, would have done).

**Customs Code:** The Customs Code of Ukraine (amended in 2006; effective March 2, 2007) provides clear *ex officio* authority (Article 257) to customs officials. The Customs Code was further revised, in force, June 2012. While some administrative improvements have been made in recent years, IIPA recommends the abolishment of the customs registration system altogether because it is an unnecessary maze of regulations which interferes with effective border enforcement.

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

Compulsory Manufacturing of Film Prints: Ukrainian law (Law of Cinematography) requires the production of film prints locally (in force, March 2010); this rule requires local film print production for the issuance of a state distribution certificate. The required local production rule was reiterated by the State Film Agency and entered into force on August 15, 2012.

Customs Valuation: In November 2009, Ukrainian customs authorities declared new customs valuation rules. Rather than assessing duties on the underlying carrier medium, the new rules assessed valuations based on projected royalties. To further complicate matters, Ukrainian customs officials stated that the new ruling would be retroactive (three years), and would be enforced with serious penalties for valuations based on the carrier medium rather than royalties. Contrary to rumors that these rules might be reversed, in May 2012 a new Customs Code was adopted (effective June 1, 2012) which affirmed the duties on royalties for both theatrical and home entertainment imports. These valuation procedures are governed by CMU Resolution No. 446.

**Generalized System of Preferences:** In the first eleven months of 2012, almost US\$69.9 million in imports to the U.S. from Ukraine enjoyed unilateral duty-free treatment under the GSP program. In 2011, over US\$53.2 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.

# ARGENTINA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Argentina remain on the Priority Watch List in 2013.

**Executive Summary<sup>1</sup>:** Argentina's leadership has demonstrated an alarming degree of indifference toward the country's high levels of piracy that, over the past year, has culminated in efforts from officials in both the executive and legislative branches that could undermine efforts to tackle this enormous problem. Digital piracy in Argentina is widespread and takes many forms. The rise in online piracy has not diminished the massive piracy of hard goods found at street fairs such as the public market near Buenos Aires known as "La Salada," which the Argentine Government promotes as a successful commercial model. Legislative proposals would eliminate civil and criminal sanctions for unauthorized file-sharing. Unlicensed software use by enterprises remains widespread, causing serious economic harm, and the Argentine Government needs to implement policies to ensure government agencies use and procure only legal software. 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 2013

- 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, provincial, and city governments take appropriate measures to:
  - Prioritize cleaning up the "La Salada" fair and similar markets to demonstrate political will against the distribution of pirate and counterfeit merchandise.
  - Identify distributors of pirate products in public markets and revoke licenses to those points of sale.
- Support efforts to issue an executive decree mandating legal software use in government agencies and implementing processes to achieve this based on software asset management best 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.

<sup>1</sup>For more details on Argentina's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2013SPEC301HISTORICALCHART.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2013 global issues, see our cover letter at <http://www.iipa.com/pdf/2013SPEC301COVERLETTER.pdf>.



**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 eleven months of 2012, more than US\$222 million in imports to the U.S. from Argentina enjoyed duty-free treatment under the GSP Program, or more than 5% of Argentina’s entire imports into the U.S.<sup>2</sup>

## **COPYRIGHT PIRACY IN ARGENTINA**

In 2012, Argentinian Government officials invited the operators of “La Salada Fair” (listed as a “Notorious Market” for its widespread availability of counterfeit goods in USTR’s December 13, 2012 list) to take part in official commercial missions to foreign countries, to showcase the market as an example of a successful, popular commercial enterprise. If the nature and scope of piracy in Argentina remained unchanged over the past year, overall the situation appears to have worsened as the government showed less interest in combating this challenge. In a trend anachronistic to patterns in most of the rest of the world, 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. Widespread use of unlicensed software by businesses remains a damaging form of infringement for the software industry. A combination of extremely high piracy and market access impediments makes Argentina one of the least hospitable markets for entertainment software publishers in the region.

**Internet piracy:** Argentina is a highly connected country, but one that suffers from such a lack of enforcement, effective laws to curb internet piracy, and government will that its market of 28 million Internet users (over 66% of the population)<sup>3</sup> is largely out of reach for legitimate copyright sectors. With the increased availability of pirated content online, 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 nearly the entire digital music market in 2012. Digital piracy for this sector occurs predominantly via direct download, for example from cyberlockers that host infringing content. In recent years, within the legitimate music consumption in Argentina, mobile platforms account for the bulk of legitimate Internet sales. 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](http://www.taringa.net)), and Musicuo ([www.musicuo.com](http://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.

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<sup>2</sup>During 2011, more than US\$477 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.

<sup>3</sup>This figure is reported by internetworldstats.com, as of June 2011.

Musicuo is an on-demand streaming music site similar to [www.grooveshark.com](http://www.grooveshark.com), that offers thousands of unauthorized music titles. The founder of Musicuo 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-Argentinian edition. The local recording industry group reports that over 50% of Argentinian Internet users who download unauthorized music from the web believe that the activity is included in their ISP connection charges.

For the software industry, the Internet offers local packages of pirated and counterfeit software, including compilations containing dozens of computer programs. BSA | The 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.

According to the Entertainment Software Association (ESA), in 2012, Argentina placed 12th in the world in terms of the number of connections by peers participating in the unauthorized file sharing of select ESA member titles on public P2P networks, a notable and regrettable increase from its 21<sup>st</sup> place ranking in 2011.

The Motion Picture Association of America (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.<sup>4</sup> Linking to illegal files is increasingly problematic, for example with [Cuevana.tv](http://Cuevana.tv), and [argentinawarez.com](http://argentinawarez.com), Argentina-based sites that provide well-organized links to hundreds of U.S.-produced movies and TV shows stored on notorious cyberlockers. Cuevana's founder is also the founder of the site Musicuo, mentioned above. At its height the site has had more than 15 million users and two million hits daily. MPAA and several local entities have filed complaints against Cuevana. Yet, to this day the site remains fully functioning and continues to operate and grow. Not only has Argentina's lack of enforcement against Internet piracy sites like Cuevana deprived MPAA members of significant licensing revenue, it has also caused Argentina to no longer be in compliance with its treaty obligations.

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 software programs:** BSA reports that the software piracy rate in Argentina was 69% in 2011, representing a commercial value of unlicensed software of \$657 million.<sup>5</sup> This piracy includes widespread unlicensed

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<sup>4</sup>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 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.

<sup>5</sup>BSA | The Software Alliance's 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Argentina was 69%, representing a commercial value of unlicensed software of US\$657 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, (...continued)

software use by business enterprises, especially in small- and medium-sized organizations. 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 ten 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.<sup>6</sup> 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. Such widespread piracy has caused the legitimate market for software, including from local vendors, to shrink. Often, unauthorized versions of newly released software reaches the local pirate market before a localized version of the software is available from Argentinian distributors, leaving users in the pirate market without authorized local expertise. There was also no material progress made by the government in implementing procedures to ensure government agencies use only legal software.

**Hard Goods Piracy and La Salada Fair:** 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 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 one 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.

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including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

<sup>6</sup>This report is posted on BSA’s website at <http://www.bsa.org/idcstudy>.

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.

On a positive note, BSA reports that physical piracy of software has diminished, 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 Argentinian 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:** Local ISPs in Argentina have gradually begun to collaborate in certain limited circumstances, such as taking down infringing sites in very specific instances. Some ISPs have established special procedures to process infringement claims from rights holders, but others require a judicial order before taking down infringing material. 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, Argentinians have a different impression; in recent years

studies have reported that one out of two Argentinians 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.

**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 a general slowness in resolving judicial procedures. The 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 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 2012, software industry representatives in Argentina conducted 90 raids or court actions against enterprises using unlicensed software. 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, but 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 in getting enterprises to legalize their software use and pay damages. Statutory damages are not available.

**Slow Prosecutions and Non-deterrent Judgments:** The judiciary in Argentina prioritizes crimes of safety and personal security over intellectual property crimes, and simply lacks the resources to do otherwise. Making matters worse, the Argentine judicial system is formal and heavy on written submissions, which means that the process of administering justice is time-consuming. Very few criminal cases reach final sentencing, and most copyright infringement cases close with a suspension of judgment. 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. Criminal sanctions are mere formalities; copyright crimes in Argentina do not carry a threat of jail sentences on any practical level.

**Delays and Weak Damages in Civil Infringement Cases:** The 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 software piracy cases. Civil actions are also weakened by the lack of deterrent civil damages; this important problem could be corrected if Argentina were to introduce an effective statutory damages system.

**Border Enforcement:** The Argentina Customs Code currently provides for *ex officio* actions. Customs authorities have a good understanding of the damage that piracy causes, not only to the owners of intellectual property rights, but also to the State itself, since pirate products evade taxes and do not generate legitimate employment. 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. A working plan and continued training to include emphasis on technology and circumvention device issues would help identify important trends and latest forms of piracy crossing Argentinian borders.

**Industry trainings and public awareness efforts:** BSA is working with the Autonomous Buenos Aires City Government to organize a joint program for capacity building.

## **COPYRIGHT LAW REFORM IN ARGENTINA**

**Proposed Amendment to Limit Liability for Unauthorized Access of Content Over the Internet:** In November 2012, Bill No. 2995-D-2012 was introduced in Argentina’s legislature that would decriminalize and eliminate all civil liability for the downloading or accessing of material over the Internet, regardless of its copyright protection status, so long as the copy “were not used for commercial purposes or profit.” Among the permitted uses for the accessing of pirate material would be for instruction, education, information, entertainment, or even “for thrills” (“emocionarse”).<sup>7</sup> The introductory language submitted with the bill specifically mentions that all activities of uploaders over P2P networks should be decriminalized. If adopted, not only would this amendment send a destructive message to Argentine consumers about the value of creative works and the need to support a legitimate creative sector, it would create a host of problems for enforcement against aggregators and networks that supply pirated content.

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

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

- Provide express protection for the “communication to the public” and “making available” rights as required by WIPO Internet Treaties, to give legal 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.

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<sup>7</sup> Details of the bill are available at <http://www1.hcdn.gov.ar/proyxml/expediente.asp?fundamentos=si&numexp=2995-D-2012>.

**Government Software Legalization:** Unfortunately, no progress was made on this important issue last year. With respect to government legalization efforts, the software industry continues to call upon the Argentine Government (in particular, the Subsecretaría de la Gestión Pública—the Undersecretariat for Public Administration) to issue an executive decree that would mandate legal software use in government agencies and implement processes to achieve this based on software asset management best practices. While several “standards” have been issued by the Subsecretaría, the Argentine Government has not taken action toward legalizing its software inventories.

## **MARKET ACCESS ISSUES**

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

**Customs Duties Affecting Audiovisual Works:** The Argentine Customs Valuation Code requires that all audiovisual works, excluding computer software, must pay an *ad valorem* customs duty based on the value of the “authors’ rights,” that is, on the potential royalty generation of the film, rather than solely on the value of the physical materials which are being imported. The Motion Picture Association (MPA) opposes this burdensome practice, which is a form of double taxation since royalties are subject to remittance, withholding and income taxes. Customs duties should be based on specific fees, such as weight or length, or, if *ad valorem*, be based on the value of the carrier medium only. Because of this duty, MPA member companies import negative prints on a temporary basis and copy positive prints locally. There have been no new developments in this matter in 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 Argentinian National Supreme Court of Justice, resulting in a considerable increase in the international license cost for end users. This problem could be solved by amending the Income Tax Act to establish a concrete withholding rate for software license payments, similar to what was done for music and motion pictures several years ago. There is also a clear need for the U.S. and Argentina to reach agreement on a treaty to avoid double taxation.

**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.

# CHILE

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Chile remain on the Special 301 Priority Watch List in 2013.<sup>1</sup>

**Executive Summary:** Due to several shortcomings, Chilean law fails to provide a robust environment for the enforcement of copyright, and Chile is not in compliance with its FTA obligations. Chile adopted important amendments to the Copyright Law that went into effect in May 2010, but provisions for the protection of Technological Protection Measures (TPMs) were not included. Government software legalization has not been adopted. 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. Significantly, the 2010 amendments set forth first steps toward a robust Internet enforcement regime, but they fall short of the type of online anti-piracy mechanisms that are contemplated in the FTA.

Nearly two years ago, 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 still remain outstanding, including several that would improve the fight against widespread piracy in Chile. Hard goods piracy remains at steady levels especially for the entertainment software industry, 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. 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 2013**

- 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 rights holders regarding copyright violations.
- 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.

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<sup>1</sup>For more details on Chile’s Special 301 history, see IIPA’s “History” appendix to this filing at <http://www.iipa.com/pdf/2013SPEC301HISTORICALCHART.pdf>, as well as the previous years’ reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA’s 2013 global issues, see our cover letter at <http://www.iipa.com/pdf/2013SPEC301COVERLETTER.pdf>.



- Launch a national Internet anti-piracy campaign, with goals for specific enforcement efforts, improved interagency cooperation, reporting on administrative and judicial Internet actions, and public awareness.
- Strengthen border enforcement with better tracking mechanisms and coordination with rights holders.

## **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 (the Internet is now available to 58.6% of the population, according to [www.internetworldstats.com](http://www.internetworldstats.com)), without effective anti-piracy mechanisms to keep pace with the increase in Internet users and available bandwidth, legitimate online distributors of copyrighted materials face enormous challenges. Internet piracy 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:** 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. 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.

**End-user software piracy:** BSA | The Software Alliance (BSA) reports that the general public as well as government officials in Chile continue to gain a better understanding of the risks involved in using pirated software and the importance of IP to the economy, and the overall rate of software piracy fell in Chile from 62% to 61% in 2011 (the most recent year studied).<sup>2</sup> The software industry remains highly concerned about widespread enterprise end-user piracy (the unauthorized use and copying of software by businesses and other enterprises). 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.

Enterprise end-user piracy of software occurs in a variety of professional businesses, 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. While there has been progress with government software legalization, more needs to be done. Adopting appropriate provisions to regulate the acquisition and management of software by the government is a critical solution, and one required by the FTA. Internet piracy of software is also a major concern in Chile, making the need for deterrent measures against online infringement an immediate one.

**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

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<sup>2</sup>BSA | The Software Alliance's 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Chile was 61%, representing a commercial value of unlicensed software of US\$382 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA's 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

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 continues to grow, now exceeding the hard goods problem significantly. Internet piracy is estimated at 90% of all music consumption in the country. IFPI Chile reports that the recording market in Chile suffered a decrease of 7%. Digital sales to computers and mobile devices continue to be heavily affected by piracy, especially via P2P exchanges and links posted on blogs and social websites. Monthly P2P unique users reached 4.7 million in 2012. The most important site in the BitTorrent network is The Pirate Bay with 317,000 unique monthly users, followed by Torrentz with 221,000 unique monthly users. In the cyberlocker arena, Mediafire and 4share dominate with 1 million and 666,000 unique users respectively.

The most common form of Internet piracy is the exchange of illegal files through P2P networks (the most popular being ARES and BitTorrent) 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. In 2012, Chile placed 11<sup>th</sup> in the world in the number of connections by peers participating in the unauthorized file sharing of select members of the Entertainment Software Association (ESA) member titles on public P2P networks, a startling leap up from its 18<sup>th</sup> place ranking in 2011 and 24<sup>th</sup> place ranking 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**

**The U.S.-Chile FTA:**<sup>3</sup> Chile adopted important amendments to the copyright law that went into effect in May 2010. These amendments moved Chile toward compliance with an important obligation under the U.S.-Chile FTA, to increase maximum criminal penalties for repeat infringers. They also brought Chile closer to compliance with its FTA obligation to establish effective notice and takedown measures for online infringement, but the procedures adopted fall short of the types of mechanisms contemplated in Article 17.11.23 of the FTA, and that can efficiently reduce online piracy in the country. Overall, since the U.S.-Chile FTA went into force on January 1, 2004, Chile has

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<sup>3</sup>The U.S.-Chile Free Trade Agreement is posted on USTR’s website at [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Chile\\_FTA/Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html). For an earlier review by IIPA of the U.S.-Chile FTA IPR Chapter, see IIPA’s Submission to the U.S. International Trade Commission on the U.S.-Chile Free Trade Agreement, May 8, 2003, available at [http://www.iipa.com/rbi/2003\\_May8\\_ChileFTA\\_ITC.pdf](http://www.iipa.com/rbi/2003_May8_ChileFTA_ITC.pdf).

failed to meet the bulk of its obligations that were due under a series of transition period deadlines, all of which have passed. Each of the following obligations remains outstanding:

- Provide for the protection of 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).
- Adopt provisions to regulate the acquisition and management of software by government agencies to ensure legal software use by federal or central government agencies (Article 17.7.4)
- 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).

IIPA and its members strongly support the FTA and for many years have urged Chile to fully and promptly comply with its FTA and international obligations.<sup>4</sup> Since the time of the 2010 amendments establishing ISP liability and deterrent criminal penalties in Chile, rights holders have been optimistic that this demonstration of governmental support for anti-piracy cooperation in the online space would result in a significant decrease in illicit activity over the Internet among Chilean users. Unfortunately, however, the government has become content to rest on its laurels for this partial advancement in voluntary cooperation among rights holders and ISPs, and has failed to come back to the table to develop an FTA-compliant notice and takedown system.

The ISP liability provisions of the 2010 legislation provide a means by which rights holders may seek a court order for the removal of infringing material by an ISP (Article 85Q of the Copyright Act) and 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.

The recording industry reports that more than 1,300 notices have been sent to five major ISPs in the Santiago area since 2011. According to IFPI Chile, reports from ISPs on the responses received from subscribers and potential recidivists are now pending. However, since the Chilean law does not include any administrative procedure with sanctions, rights holders must now initiate judicial actions, making enforcement of their rights cumbersome.

**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

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

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 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 that have been subject to due process, 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.<sup>5</sup>

Low minimum criminal sentences: As adopted, the amendments achieve new maximum prison sentences and fines, which can reach US\$140,000 (2,000 *Unidades Tributarias Mensuales* (UTMs)) for repeat offenders. The law does not, however, increase the minimum sanctions for infringements. As a result, the copyright industry fears that most judges, who usually apply only the lower limits, will continue to apply these low levels of sanctions. Efforts in separate legislation (discussed below) may go part of the way toward implementing more deterrent criminal sanctions for piracy. Sanctions should clearly apply in cases involving Internet piracy, especially involving those who upload protected copyrighted materials.

No protection for Technological Protection Measures: Rights holders remain extremely disappointed that Chile continues to ignore its obligation under Article 17.5 of the FTA to provide adequate legal protection for TPMs used to control access or otherwise restrict unauthorized acts with respect to a protected work. Due to the lack of protection under current law, the sale of circumvention devices continues unabated in markets and online. In fact,

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

one ESA member reports that Chile is among the top-10 countries in terms of the number of game copier devices made available through online auction sites.

**Trans-Pacific Partnership FTA:** Chile is an initial TPP negotiating partner. IIPA continues to view 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, and with Chile's intellectual property agency (INAPI) and the Director of the Tax Agency. 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 four other regions, with plans to expand to a fifth region in 2013. Civil *ex parte* actions are still a critical remedy for the business software industry. BSA reports that in 2012, 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.

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 provide 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 2012. 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. However, police operations rarely result in the arrest of responsible individuals and almost never in effective prosecutions. This pattern reflects 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. As with physical piracy, the industry hopes to continue fighting piracy through local teams. The Specialized Prosecutor's Office continues to show very little interest in prosecuting the social site Chilecomparte for its dedicated pirate music and video components, despite the fact that Chilecomparte is the biggest local online source for unauthorized distribution of pirate music.

The entertainment software industry indicates that [www.h2zone.cl](http://www.h2zone.cl), which is hosted and operated in Chile, continues in 2012 to be 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 2010 copyright law amendments help to foster cooperation between rights holders and ISPs in cases where content is hosted on the ISP's server. However, 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.

**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.

# CHINA (PRC)

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

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

**Executive Summary:** The situation in China for copyright owners remains an enormous challenge, despite some positive developments that deserve recognition. High copyright piracy levels persist in China, from widespread online piracy of music, films, television programming, books and journals, and other copyright materials, to pervasive use of unlicensed software by enterprises (including state-owned enterprises) and pre-installation of unlicensed software and other copyright materials (hard disk loading piracy) at the distribution level, and physical piracy including the export of relatively high-quality counterfeits and “media boxes,”<sup>2</sup> as well as the export of counterfeit/pirated books. While periodic enforcement campaigns (including one in June 2012 to address online infringements), some continued administrative actions, and transfers of some cases for criminal prosecution have had some effect, piracy will not abate until the Chinese government takes a much more active approach to criminal enforcement. In addition, China still maintains too many significant barriers to creative content (like the console ban) harming U.S. companies as well as Chinese businesses, and preventing the development of a healthy marketplace for copyright materials.<sup>3</sup> China must fully implement the market reforms required by the WTO market access decision, and needs to rationalize its regulatory structure to facilitate rather than hinder the creation of a legitimate online market. Failure to legalize the use of software and other copyright materials by government agencies and state-owned enterprises (SOEs), as promised in previous years and again in the 2012 U.S.-China Strategic & Economic Dialogue (S&ED) and the 2012 U.S.-China Joint Commission on Commerce and Trade (JCCT), results in significant lost opportunities for creative companies’ commercial growth in China. Notwithstanding the recent U.S.-China Film Agreement, the Chinese government should move towards promoting and granting necessary approvals on a non-discriminatory and transparent basis to other companies to engage in national distribution of foreign motion pictures for theatrical release, should support further movement to normalize the relationship between producers and distributors of foreign films, should develop transparency in the censorship approval process, and should avoid periods of “special protection” for domestic films that interfere with the normal commercial practices for the release and scheduling of imported films.

However, some positive developments in China in the past year deserve recognition. These include the historic U.S.-China Film Agreement in February 2012, the issuance of long-awaited Supreme People’s Court (SPC) *Judicial Rules on Several Issues Concerning the Application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right to Network Dissemination of Information* (2012 Network Rules) in December 2012, cooperative activity between stakeholders and Chinese online services aimed at curbing infringements of U.S. right holders’ copyright materials,<sup>4</sup> and the welcome news that China’s *Gougou* pirate search engine shut down over piracy concerns (*Gougou* was run by notorious site *Xunlei*, which had cancelled a planned IPO in 2012, also over

<sup>1</sup>For more details on China’s Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2013SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years’ reports at <http://www.iipa.com/countryreports.html>. Section 306 monitoring is with respect to, among other obligations, those set out in Ministry of Foreign Trade and Economic Cooperation Minister Wu Yi, *People’s Republic of China Intellectual Property Rights Memorandum of Understanding—1995 Action Plan*, February 26, 1995.

<sup>2</sup>“Media box” piracy consists of hardware sold that facilitates remote access to music videos, karaoke, audiovisual, and other creative materials. These boxes are being manufactured in China and exported to overseas markets throughout Asia. This next generation piracy threatens not only the Chinese market for content but is exported from China, harming other markets.

<sup>3</sup>The Guangdong Chamber of Audio and Video Distributors ceased its operations in February 2011 because of rampant piracy problem and the lack of Chinese government support. While we do not have quantitative information of exact revenue losses due to piracy, we know that due to rampant piracy, over 90% of a Chinese film’s return on investment comes from theatrical box office revenues, while in the United States theatrical revenue averages 25-30% of total revenue. Thus, it appears that piracy has a dramatic effect on revenues in China from non-box office sources.

<sup>4</sup>Industry reports that the PSBs, prosecutors, and judges in some cities (e.g., Shanghai, Shenzhen, and the Beijing Haidian District) ramped up their efforts in addressing online piracy and counterfeit software in 2012.



piracy concerns). In addition, the Chinese government moved forward with a process to make much needed amendments to the Copyright Law, and started to research and draft a new amendment to the IPR criminal liability provisions in the Criminal Code, which will continue in 2013.

China amended its Catalog of Foreign Investment Guidelines in December 2011 in part to align Chinese measures with the 2009 WTO case involving market access of movies, music, and publications, partially opening some of those industries' sectors to foreign investment for the first time. However, China's restrictions remain both vague and onerous, undermining business clarity and predictability. China must fully comply with the decision of the Appellate Body in the 2009 WTO market access case, and should eliminate its discriminatory censorship processes. In addition, Chinese and foreign firms engaged in more partnerships in 2012, including U.S.-Chinese film co-productions and numerous licensing deals with online portals providing opportunities for the development of programming and establishment of authorized online distributors. Significantly, during the 2012 S&ED, China recognized the importance of increasing sales of legitimate IP-intensive products and services in line with China's status as a globally significant consumer of these goods. This was an important recognition by the Chinese government that real progress on IP protection and enforcement must be measured based on whether there have been significant increases in sales of copyright and other IP-intensive products. Sadly, for IIPA members, this has yet to be realized. We urge that increased sales of IP-intensive products and services continue to be used as the benchmark of progress in bilateral negotiations with China on IP issues.

As a new leadership group comes to power in China, we urge them to build on the signs of progress we saw in 2012 and devote greater resources and attention to addressing market barriers that keep the Chinese market closed and ultimately stunt commercial growth for the U.S. copyright industries, as well as providing deterrent levels of enforcement against piracy in all its forms.

## **PRIORITY ACTIONS REQUESTED IN 2013**

### **Market Access**

- Meaningful implementation of the WTO cases, to provide creators with meaningful access to the Chinese market for their goods and services, as well as faithful and comprehensive implementation of the February 2012 U.S.-China Film Agreement, including: actively promoting and approving Chinese companies to engage in national distribution of theatrical films; providing for transparency in the censorship process; eliminating special periods of protection for domestic films, so as to permit foreign films to be released and scheduled (permitting both the Chinese distributor and the producer to achieve maximum commercial benefits); and ceasing other actions taken by the government and SOEs (formal or otherwise) which have a discriminatory impact on foreign producers.
- Cease discriminatory and suspect censorship for online distribution of music in China and remove the exclusive licensee requirement for online music distribution.
- Remove prohibitions against foreign enterprises and foreign-invested enterprises (FIEs) participating in publishing activities.
- Ensure that no measure in China conditions market access on local ownership or development of a service or product's intellectual property, or compels transfers of foreign intellectual property and R&D to China, including sales of information security software and cloud computing products.
- Refrain from introducing mandates or preferences favoring the acquisition of Chinese (over foreign) software.
- Ease the ban on the sale and importation of videogame consoles.

### **Enforcement**

- Ensure full implementation of the 2012 Network Rules to ensure that those who intentionally facilitate infringement, including through services which build on or otherwise encourage infringement of creative materials, are held liable for their activities.
- Bring effective administrative and criminal investigations and enforcement against online piracy services that facilitate piracy (such as *Sohu/Sogou*, *Xiami*, and *PaiPai*), mobile piracy (including on mobile networks, such as unauthorized wireless access protocol (WAP) sites and mobile "apps" which enable users to carry out

unauthorized downloading and streaming of infringing music to smart phones), commercial end-user and hard-disk loading piracy of software, and physical piracy such as at *Buynow PC Malls*.

- Allow more specialized IPR judges to hear criminal cases and allow right holders as victims to file collateral civil claims for compensation during the trial of criminal IPR cases.
- Follow through with JCCT commitments that government agencies and SOEs, the latter which account for a substantial share of the country's economy, will use only legal software, and implement transparent and verifiable programs to ensure government agencies and SOEs comply with this requirement.
- Follow through with respect to China's promise to implement mechanisms, including transparent performance indicators, to hold local government officials responsible for effectively enforcing IP violations, including Internet and mobile piracy, and enterprise end-user piracy of software.
- Ensure that the State Administration of Radio, Film, and Television (SARFT) is implementing watermarking in theatrical prints and ensure that the Chinese government and those involved in the value chain for theatrical distribution step up efforts to deter illegal camcording.
- Follow through with JCCT commitments to resolve the longstanding complaint regarding entities engaged in unauthorized copying and distribution of academic, scientific, technical and medical journals.<sup>5</sup>
- Establish a central authority responsible for compiling statistics of ongoing and completed civil, administrative, or criminal enforcement actions and cases involving copyright infringement; and provide those statistics to the U.S. government and affected stakeholders.
- Increase actions by SARFT, the General Administration on Press and Publication (GAPP), the Ministry of Culture (MOC), and the Ministry of Industry and Information Technology (MIIT) to revoke business licenses and halt online services by enterprises that deal in/provide access to infringing materials, and shut down websites that engage in such activities.<sup>6</sup>
- Enhance "pre-release" administrative enforcement for motion pictures, sound recordings, and other works, e.g., by establishing voluntary government-backed online copyright bulletin boards.
- Expand resources at National Copyright Administration of China (NCAC), local Copyright Administrations, and Law and Cultural Enforcement Administrations (LCEAs), commensurate with the scale of the piracy problem.
- Allow foreign right holder associations to increase staff and conduct anti-piracy investigations.
- Confirm shorter, more reasonable time limits for civil IP infringement trials, if necessary, through amendments to the Copyright Law or the promulgation of a new judicial interpretation.

### Legislation and Related Matters

- Amend the Copyright Law, Criminal Code, and subordinate legislation/regulations to ensure full compliance with the Berne Convention, the TRIPS Agreement, the WIPO Copyright Treaty (WCT), and the WIPO Performances and Phonograms Treaty (WPPT).
- Ensure the criminalization (if necessary through amending the thresholds) of: 1) unauthorized use of software by enterprises (enterprise end-user software piracy); 2) hard disk loading of software or other copyright materials; 3) Internet piracy including the communication to the public or the making available of any work/related right; and 4) circumvention of technological protection measures, trafficking in circumvention technologies and providing circumvention services.
- Specify and lower the proof requirements for evidence preservation orders and injunctions in civil copyright infringement actions.
- Make it a violation of law to use, or attempt to use, an audiovisual recording device to make or transmit a copy of a cinematographic work or other audiovisual work, or any part thereof, from a performance of such work in an exhibition facility.

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<sup>5</sup>In particular, the Ministry of Education should adopt regulations to ensure that all books and journals acquired by and used at universities (whether by professors, professional staff or students) and by the government are legitimate copies.

<sup>6</sup>At an annual meeting of the Internet Society of China and the Mediation Center Internet Legal Professionals held in Beijing in mid-January 2013, MIIT announced it would be establishing a digital dispute-resolution center to deal with disagreements over intellectual property and online copyright issues. Ellyne Phneah, *China to Establish Center to Resolve IP Disputes*, ZDNet, January 23, 2013, at <http://www.zdnet.com/cn/china-to-establish-center-to-resolve-ip-disputes-7000010164/>.

- Lower the threshold for criminal enforcement actions to be taken against infringers, including Internet infringers, and including infringements undertaken for purposes other than commercial gain.

## **PIRACY AND ENFORCEMENT CHALLENGES IN CHINA**

Previous IIPA submissions<sup>7</sup> have described in great detail the many forms of copyright piracy faced by IIPA members in China. Such piracy activities greatly disadvantage companies that respect copyright, whether they are Chinese or foreign entities. For example, the BSA | The Software Alliance's annual Global Software Piracy Study indicates that the commercial value of unlicensed software piracy in China rose to \$8.9 billion in 2011 – an amount that has more than doubled since 2005 and that is almost half the value of all unlicensed software in the Asia-Pacific region. The piracy rate remained an extremely high 77%, well above the global average of 42% and the Asia-Pacific average of 60%.<sup>8</sup> As another example, a new business model involving media boxes facilitating remote access to music videos, karaoke, audiovisual, and other creative materials, are being manufactured in China and exported to overseas markets throughout Asia. The negative effects of Chinese piracy were already well apparent. A May 2011 ITC report found that copyright infringement was the largest category of reported IP infringement in China in 2009 and that overall IP infringement in China costs the U.S. economy as much as \$107 billion and upwards of 2.1 million jobs.<sup>9</sup> Meanwhile, the enforcement situation in China remains difficult. For example, the recording industry reports that less than 17% of the complaints filed against unlicensed online music services led to termination of the service in question. The following highlights some key piracy challenges faced by the copyright industries in China.

**Internet and Mobile Piracy Updates:** Internet and mobile piracy in China remain severe problems. China boasted 538 million Internet users as of the end of June 2012, or 39.9% of the entire Chinese population (up from 38.3% at the end of 2011) (according to the China Internet Network Information Center (CNNIC)).<sup>10</sup> According to the MIIT, the total number of mobile phone subscribers in China amounted to more than 1.095 billion by the end of October 2012,<sup>11</sup> approximately 212 million of whom (nearly 19%) are connected to high speed 3G networks. 388 million Chinese access the Internet through their mobile devices, making mobile devices the top manner in which people in China access the Internet. Among these users, those who access mobile videos also increased dramatically to top 100 million users, or 27.7% of all mobile users. In addition to the mobile Internet users, almost all of whom enjoy high-speed wireless networks, the number of broadband users continues to grow exponentially in China, although still lagging behind many developed economies. According to MIIT, by April 2012, the number of broadband users in China reached 159 million, or 11.7% in terms of the penetration rate (whereas most developed markets are around 25% penetration rate). According to CNNIC, most Internet users, whether through wire or wireless, fixed or mobile, use the Internet to access content.<sup>12</sup> Sadly, most of this content accessed is illegal.

<sup>7</sup>See, e.g., International Intellectual Property Alliance, *China's WTO Compliance - Notification of Intent to Testify and Testimony Re: "Request for Comments and Notice of Public Hearing Concerning China's Compliance With WTO Commitments"* (77 Fed. Reg. 50206, August 20, 2012), September 19, 2012, at [http://www.iipa.com/pdf/2012\\_Sep19\\_China\\_WTO\\_Compliance\\_Request\\_to\\_Testify\\_and\\_Testimony.pdf](http://www.iipa.com/pdf/2012_Sep19_China_WTO_Compliance_Request_to_Testify_and_Testimony.pdf); International Intellectual Property Alliance, *IIPA Written Submission Re: IIPA Written Submission Re: 2012 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 77 Fed. Reg. 48583 (August 14, 2012), Docket No. USTR-2011-0011, September 14, 2012, at [http://www.iipa.com/pdf/2012\\_Sep14\\_Notorious\\_Markets.pdf](http://www.iipa.com/pdf/2012_Sep14_Notorious_Markets.pdf).

<sup>8</sup>BSA | The Software Alliance's 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in China was 77%, representing a commercial value of unlicensed software of US\$8.9 billion. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA's 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

<sup>9</sup>United States International Trade Commission, *China: Effects of Intellectual Property Infringement and Indigenous Innovation Policies on the U.S. Economy*, Investigation No. 332-519, USITC Publication 4226, May 2011, available at [www.usitc.gov/publications/332/pub4226.pdf](http://www.usitc.gov/publications/332/pub4226.pdf).

<sup>10</sup>China Internet Network Information Center (CNNIC), *The 30th Survey Report*, September 28, 2012, at [http://www1.cnnic.cn/IDR/ReportDownloads/201209/t20120928\\_36586.htm](http://www1.cnnic.cn/IDR/ReportDownloads/201209/t20120928_36586.htm).

<sup>11</sup>Ministry of Industry and Information Technology (MIIT), *October 2012 Report on Changes in Mobile Connectivity*, November 29, 2012, at <http://www.miit.gov.cn/n11293472/n11293832/n11294132/n12858447/15036659.html>.

<sup>12</sup>According to CNNIC, in 2011, of all Internet users, 75.2% used the Internet for "Web music," 63% used the Internet for "Web game," 63% used the Internet for "Web video," and 40% used the Internet for "Network literature." CNNIC reported that by the end of 2011, "online music, online games and entertainment applications such as online literature slightly increased in the number of users, but usage has declined. In contrast, the number of network video users increased (...continued)

The harm caused by Internet piracy can perhaps be best understood in numbers by comparing the values of China's legitimate market for certain types of creative products with that of other countries. For example, the value of total legitimate digital sales for music in 2010 in China was a mere US\$48.8 million, and total revenue (both physical and digital) was a mere US\$64.3 million. This compares to almost \$4.4 billion in the U.S., US\$178.4 million in South Korea and US\$68.9 million in Thailand — a country with less than 5% of China's population and with a roughly equivalent per capita GDP. If Chinese sales were equivalent to Thailand's on a per capita basis, present music sales would be almost US\$1.4 billion, and even that would represent under-performance and reflect significant losses to piracy. It is fair to say that China's lack of enforcement against music piracy — particularly on the Internet, amounts to well more than US\$1 billion in subsidies to Chinese Internet companies who can provide their users with access to music without negotiating licenses therefor.

**Online Music Piracy Update:** Online music piracy is still rampant despite the nationwide campaign, and despite the welcome news that in early January 2013, *Gougou* closed down its pirate search engine operations. Run by *Xunlei*, *Gougou* closed just after being listed by the U.S. Trade Representative on its Notorious Markets list. The parent site *Xunlei* was slated to launch an IPO in 2012, but postponed that, apparently due to piracy concerns.<sup>13</sup> Aside from this notable development, the music industry notes that there has been a significant proliferation of unlicensed video websites and user-generated content (UGC) sites where music can be found. In general, unlicensed music can be easily found through one-click hosting sites (referred to as cyberlockers), forums, deep-linking services (like *Sohu/Sogou*),<sup>14</sup> through peer-to-peer (P2P) services (like *Xiami*), and through unlicensed music portal sites (although we see a decreasing number of such sites). By the end of June 2012, with continuous growth of mobile phone subscribers, unlicensed music WAP sites resumed operation and more WAP sites have been identified as providing unauthorized music content through mobile networks.<sup>15</sup> Rapid growth of smartphones further facilitates music piracy via mobile applications. The rapid expansion of Internet connectivity is also leading to the development of cloud services which will pose new challenges to copyright protection.<sup>16</sup> A wide range of newly released and/or pre-release content is posted at forums/blogs which then direct users to download or stream unauthorized music files saved in one-click hosting sites (cyberlockers). Functionality facilitating one-click sharing to a long list of "social networks" is also not uncommon in China. Micro-blogging sites like *Weibo* (China's version of Twitter but having nearly 170 million users as of mid-2012, according to CNNIC) are being used for easy and simultaneous sharing of copyright content without authorization.

Enforcement challenges for the music industry in the online environment abound. They include reluctance of police in many places to investigate Internet piracy cases by using technical means and working with other divisions to track down pirates who operate on the Internet. These procedural and capacity problems are exacerbated by the fact that the Internet protocol (IP) addresses of music servers where unlicensed music content originates and the domain name system (DNS) servers of domains of unlicensed services are changed by the pirates frequently and easily. This causes concern among the law enforcement agencies as it affects the increasing costs of evidence collection and, in some cases, may cause concerns with respect to jurisdiction over the infringing services. In addition, in the mobile environment, it is difficult to identify the developers of unlicensed mobile applications when no identification details are made available through the online "app" marketplaces. In terms of the music industry's experience enforcing against online piracy in 2012, take down rates of unlicensed content listed in cease and desist notices were about 61% in 2012; however, the major problem is that the same infringing content may become available *via* a different URL at the same online service. Judicial enforcement continued in 2012 with several cases

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(...continued)

14.6% over the previous year, reaching 325 million people, while the utilization rate increased to 63.4%." CNNIC, *29th China Internet Development Statistics Report*, January 16, 2012, at [http://www.cnnic.cn/dtyqg/dtgg/201201/20120116\\_23667.html](http://www.cnnic.cn/dtyqg/dtgg/201201/20120116_23667.html).

<sup>13</sup>China's *Gougou.com* 'Pirate Search Engine' Shuts Down, BBC News, January 2, 2013, at <http://m.bbc.co.uk/news/technology-20888465>.

<sup>14</sup>Deep linking services like *Sohu/Sogou* collect links to infringing content and provide users the ability to engage in piracy through "deep linking," by which users bypass the homepage of the site where the pirated illegal content resides and link to it directly.

<sup>15</sup>Mobile broadband provides instant access to infringing copyrighted material, not only music, but also video, books, software and videogames. The recording industry notes that a wide range of unauthorized WAP sites and mobile applications, and other domestic mobile platforms offer infringing song files for streaming and download.

<sup>16</sup>The software industry also reports the emergence of cloud pirate lockers, in which pirated software titles are stored by users using "cloud" services and making them available to others, thus harming legitimate software copyright holders.

resulting in what were regarded as heavy penalties; unfortunately, these few cases do not seem to have had an overall deterrent effect on operators of many other unlicensed services.

**Online Motion Picture Piracy Update:** For the motion picture and television industry, the most significant commercial development in China in 2012 came with the conclusion of the U.S.-China Film Agreement. The industry also benefitted from increased pressure applied to online video piracy sites, e.g., through the U.S. government's Notorious Markets listings, and as a result, major motion picture companies have developed meaningful digital businesses in China and entered into major commercial deals with leading online websites in China. Nonetheless, Internet piracy remains the largest threat to the entire U.S. film and television industry in China. Online rogue video sites facilitated and/or supported by P2P streaming and download software, e.g., *QVOD*<sup>17</sup> and *Baidu Yingyin*, have become threats to legitimate websites as sources of pirated video content online. In addition to these rogue sites, increasingly, mobile apps facilitate copyright violations over many of the websites already under NCAC's monitoring list. Live sports telecasts also suffer from unlicensed programming retransmission, by which users or services on the Internet take protected telecasts and broadcasts and make them freely available, often simultaneously with the television broadcast.

Regarding enforcement, the motion picture industry reports fluctuations in takedown compliance rates for some of the larger-scale websites monitored under the NCAC's "self-discipline" list, notwithstanding a reported takedown rate of over 90% for other sites. Out of the 18 major online video websites under the NCAC monitoring, many still have a substantial amount of infringing content. One overriding enforcement concern is the increasingly transnational nature of the infringing activity. Some illegal Chinese online video sites locate their servers in third countries (e.g., in the U.S., Korea, or Taiwan). The off-shore location of the server poses jurisdictional problems and requires cross-border enforcement cooperation.

**Online Sale of Hard Goods Piracy:** Given China's explosive growth of e-commerce, the online sale of pirated hard goods, for example, through auction sites, business-to-business (B2B) sites, and business-to-consumer (B2C) sites, has become an increasing problem for the industry. This phenomenon consists of websites and/or online sellers targeting foreign buyers, distributing and selling illicit copies of copyright material, or other products, such as circumvention tools to bypass technological protection measures used by right holders to protect their works. In 2012, in part through pressure from the U.S. government's Notorious Markets list, some significant movement occurred on many such sites toward eradicating piracy or addressing right holder concerns; in some cases, significant voluntary agreements or MOUs resulted. There remain some problematic auction, B2B, and B2C sites. One specific problem regarding these sites is that pirates using them operate anonymously. As a result, the identification details of sellers are usually available only to the payment gateway and/or the online market operators, and further investigations into problematic test purchases were impossible by copyright owners. Another online commercial phenomenon involves "karaoke" players loaded with infringing music content and media boxes (such as the "Asibox") facilitating remote access to music videos sold at online marketplaces for both local consumption as well as for export.

**Online Journal Piracy:** The existence of unlicensed online journal delivery services continues to plague scientific, technical and medical (STM) publishers. As the result of attention from the industry, some services have become more cautious, keeping a lower profile and shifting their profiles to 'appear' more legitimate, but the core issues remain the same. *KJ Med* is an example of a site which provides and delivers unauthorized digital copies of millions of articles from leading academic, scientific, technical and medical journals on an illegal subscription basis to customers in libraries and hospitals throughout China, with neither the consent of, nor payment of subscription fees to, right holders. Despite the issue being a key agenda item in several years' JCCT dialogues,<sup>18</sup> and despite some

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<sup>17</sup>While it is difficult to peg QVOD as a direct infringer, since it merely facilitates others' provision of infringing materials, there may be some hooks that enable a finding of liability, particularly in light of the new Internet JIs. For example, the QVOD site has a search functionality called "Happy Search" which, if a link to QVOD can be shown, might be a basis for liability. Similarly, it should be noted that smaller websites that use QVOD to facilitate infringement would most certainly be considered infringing under the law and Internet JIs. Cf. Luo Yanjie, *Why It Is Not Easy to Combat QVOD Copyright Infringement?*, Bridge IP Law Commentary, August 27, 2012, at <http://www.chinainlawyer.com/easy-combat-qvod-copyright-infringement/>.

<sup>18</sup>The *KJ Med* issue was first raised with Chinese enforcement authorities in 2006. Following a number of transfers among several agencies, the case was lodged with the Beijing Copyright Administration Enforcement Department where it languished.

positive developments over the last year, the longstanding complaint against sites that provide unauthorized access to STM journal articles remains unresolved.<sup>19</sup> The unauthorized copying and distribution of publishers' content is in violation of the Copyright Law and applicable international norms, and should be meaningfully and expeditiously resolved. The Chinese government should make clear that such blatant copyright piracy will not be permitted under China's copyright regime, particularly in light of statements regarding the government's desire to develop an internationally competitive publishing industry and the still ongoing copyright law reform process.

**Online Videogame Piracy:** The entertainment software industry continues to report extreme levels of Internet piracy of videogames in China. P2P downloads of infringing video game files is fast becoming the predominant form of piracy along with websites that offer infringing videogame product that can be accessed from home PCs and from Internet cafés, which make available not only unauthorized games but also unauthorized videos and music for viewing, listening or copying by customers onto discs or mobile devices. In 2012, China placed eighth in the world in the number of connections by peers participating in the unauthorized file sharing of select Entertainment Software Association (ESA) member titles on public P2P networks.<sup>20</sup>

**Enterprise End-User Piracy:** The software industry continues to face unlicensed software use by enterprises on a massive scale – including private enterprises, state-owned enterprises and government agencies.<sup>21</sup> Piracy of U.S. software in China not only diminishes sales and exports for U.S. software companies, but gives an unfair competitive advantage to Chinese firms that use this unlicensed software without paying for it to produce products that come into the U.S. market and unfairly compete against U.S.-made goods produced using legal software.<sup>22</sup>

A significant hurdle to effectively dealing with enterprise end-user piracy in China remains the lack of clarity with respect to criminalization of this form of piracy. While the SPC indicated in a 2007 Judicial Interpretation (JI) that under Article 217 of the Criminal Law, unauthorized reproduction or distribution of a computer program qualifies as a crime, authorities remain unwilling to take criminal end-user cases. The Chinese government should take the necessary steps to clearly criminalize enterprise end-user piracy, through amending the Criminal Code and Copyright Law and issuance of a new judicial interpretation by the SPC and the Supreme People's Procuratorate (SPP). One hurdle to bringing criminal end-user cases has been Chinese authorities' narrow interpretation of the "for-profit" requirement in Article 217. The 2011 Criminal IPR Opinions could be helpful in this regard, since they define in Article 10(4) the criteria of "for profit" as including "other situations to make profit by using third parties' works." Since the unlicensed use of software in enterprises involves reproduction and/or distribution, and since use of unlicensed software lowers costs and allows enterprises to "make profit," the Opinions appear to support criminalization of enterprise end-user piracy. Another key hurdle is meeting the applicable thresholds, i.e., calculation of illegal revenue or illegal profit, even if determined to be "for profit."

Without a criminal remedy, the only avenues for seeking redress have been the administrative and civil systems, which are under-funded and under-resourced, and which generally result in non-deterrent penalties. First, administrative copyright authorities in most areas are reluctant to do raids against businesses suspected of using pirated software. IIPA remains disappointed with the lack of concrete results from administrative actions against businesses using unlicensed software.<sup>23</sup> Unfortunately, in 2010, software end-user complaints shifted jurisdiction from the local copyright administrations to the LCEAs, leading to even fewer administrative actions. In 2012, BSA

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<sup>19</sup>In the 2010 JCCT IPR Working Group meeting, the Chinese government requested that the publishing industry file its case anew with the NCAC, which publishers did in 2011. To date, the case remains under investigation.

<sup>20</sup>ESA's reporting on P2P activity does not take into account downloads of these titles that occur directly from hosted content, such as games found on "cyberlockers" or "one-click" hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

<sup>21</sup>See *supra* note 8.

<sup>22</sup>China's 77% software infringement rate means essentially that Chinese enterprises on average pay for only slightly more than 1 out of 5 copies of software they use and then compete unfairly with U.S. businesses that pay for more than 4 out of 5 copies of the software they use to run their businesses and improve productivity.

<sup>23</sup>For example, we still have not been provided with any information on progress or outcomes arising out of 23 administrative actions filed with NCAC during the Special IPR Enforcement Campaign in 2010.

lodged 12 complaints against enterprise end-user piracy, and only five administrative raids were conducted in 2012.<sup>24</sup> The situation remains difficult with regard to civil enforcement, but has seen some incremental improvement in recent years. The civil system is marred with difficulties when it comes to end-user piracy actions, as some courts set excessively high evidentiary burdens for evidence preservation, and pre-trial evidence preservation order applications or applications for injunctions are often rejected by the courts in some areas.<sup>25</sup> In addition, where a civil order is issued, right holders and authorities often face on-site resistance against evidence preservation (e.g., deletion of infringing software while enforcement authorities are carrying out an inspection) and have only a limited amount of time to conduct software infringement inspections. Another key hurdle is the accounting method for damages, highlighting the need to significantly increase statutory damages beyond that currently laid out in the most recent revised amendment to the Copyright Law.

**Government and Enterprise Legalization of Software and Related Issues:** Through both the JCCT and the S&ED, the Chinese government has repeatedly made commitments to ensure legal software use by government agencies and SOEs. These include the commitments made at the 2011 JCCT to: 1) ensure that government agencies at all levels use only legitimate software and that all types of software used by government agencies are licensed; 2) devote increased resources to conducting software license audits and inspections of government agencies and publish the results; 3) complete software legalization by provincial governments by mid-2012 and by municipal and county governments by 2013; and 4) promote and conduct enterprise software management pilot projects and publish progress reports. This was followed by a commitment at the 2012 S&ED that China would expand its efforts to promote legal software use by enterprises and conduct more regular audits of software on government computers. At the 2012 JCCT, the Chinese government gave assurances that it requires SOEs under the authority of the China Banking Regulatory Commission and the State-Owned Assets Supervision and Administration Commission of the State Council to purchase and use legitimate software, though no details were provided on how the Chinese government will ensure SOE's comply with these requirements. The Chinese government should follow through with these commitments by implementing transparent, verifiable and comprehensive software legalization programs at all levels of government (central, provincial, municipal, and local) and for all SOEs. These should include providing sufficient budgets for government purchases of legal software, targeting all categories of software (not just select ones) for legalization and instituting a process for government agencies and SOEs to implement software asset management (SAM) best practices to ensure compliance. The Chinese government must also follow through on its commitment in prior years to ensure that all computers produced or imported into China have legal operating systems.

**Pre-Installation Piracy (Hard Disk Loading):** The sale of hard drives or other devices with pre-installed illegal content in large computer malls or electronic shopping centers in Beijing and Guangdong, like *Buynow PC Malls*, remains a major problem for copyright holders. To “sweeten the deal,” merchants provide “value-added” services to download software, illegal films and television programs, or other content (very often the audiovisual content comes from illegal websites offering infringing HD content). The practice is now causing significant losses of revenue from Blu-ray disc sales for motion picture companies and unlicensed use of karaoke videos for the recording industry, in addition to traditional hard disk loading of software. Another serious problem is that it is common for PC resellers to install pirated software in new PCs shipped to large buyers including government, schools, hospitals, enterprises, etc. even though these buyers clearly required genuine software in their procurement requests. The practice is clandestine and enforcement authorities are reluctant to prioritize enforcement against it. The Chinese government should clarify criminal liability for “hard disk loading” and carry out deterrent enforcement efforts including criminal cases. Unfortunately, there have been very few cases, penalties awarded vary dramatically in different localities, and some refuse to apply “sampling” during the examination of computers in order to assess damages or

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<sup>24</sup>Not all cases resulted in administrative fines, and fines remain generally non-deterrent. In many of these cases, there were no seizures of the unlicensed software and computers employing it. In 2010, BSA lodged 36 complaints against end-users, including 13 with the local authorities, on top of the original 23 complaints filed with NCAC, but only 10 administrative raids resulted.

<sup>25</sup>The courts require copyright owners to provide preliminary evidence of infringement, which is difficult if not impossible since they are not in a position to check an alleged infringer's computers even for preservation of the evidence. The court has rejected applications for pre-trial evidence preservation orders or injunctions, claiming the preliminary evidence submitted is insufficient to prove infringing use of copyrighted software. This creates an impossible situation.

penalties. At least three cases are reportedly in the preliminary investigation phase by different local Public Security Bureaus (PSBs).<sup>26</sup>

**Book, Textbook, and Journal Piracy:** In addition to the online piracy issues described above, the U.S. publishing industry continues to suffer from physical piracy including unauthorized copying of academic textbooks, unauthorized printing of commercial bestsellers, print- or copy-to-order services, and the availability of pirated or counterfeit books through itinerant street vendors. Well known university presses suffer from trademark infringement as well, with university names and seals reproduced on content bearing no relation to the pertinent university press. Smaller, often private “copy shops” on or near university campuses, are now the norm and while local enforcement agencies appear willing to take action, the lack of adequate personnel and the one-off nature of the transactions (i.e., copy/print-to-order) make enforcement difficult. These shops engage in unauthorized copying of books to order (brought in by customers for copying) to having popular titles pre-printed and available for purchase, to the most serious and sophisticated arrangements where massive catalogues of thousands of titles in digital form are available for immediate printing-to-order. Pirated or counterfeit bestsellers remain available for sale openly on the streets of Beijing in a number of locations. Individual vendors are often mobile and do not carry large stocks. Wholesalers carry larger stocks, but typically the English language titles are only a relatively small proportion of their stocks. Previous attempts to disrupt the supply chain feeding the street and wholesale traders have been frustrated by the lack of available personnel, e.g., in the Beijing Copyright Bureau, to conduct coordinated or simultaneous raids on multiple targets at different levels of the chain. In one exceptional case, the industry referred two shops with a significant level of activity to local law enforcement. One of the shops also had an online store through which it offered for sale pirated copies of pirated text books. While the referrals themselves were not resolved conclusively against the shops, the local enforcement agency did take additional measures and, on their own initiative, conducted inspections against a number of other copy shops which resulted in the seizure of a large quantity of unauthorized copies of English Language Teaching (ELT) materials.

The partnership of the Ministry of Education (MOE) with GAPP, NCAC and local authorities remains essential to tackling the ongoing textbook piracy issues. The industry has positive relations with the authorities, but finds their attention is diverted as soon as pressure (e.g., out of the JCCT or a “special campaign”) wanes. Many limitations remain for addressing hard goods book and journal piracy in China, including a lack of resources in the administrative enforcement authorities, inability to react to time-critical information, inability to handle coordinated raids against multiple targets, lack of power and/or willingness to enter unmanned premises without very clear evidence of specific infringing copies being present in the premises at that time.

**Hard Goods Piracy and Availability of Circumvention Devices:** The industries note resurgent physical piracy in China,<sup>27</sup> including: the manufacture and distribution of factory optical discs (determined through forensic matches of pirate CDs submitted to the Ministry of Public Security (MPS) for testing);<sup>28</sup> the burning of recordable

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<sup>26</sup>For example, on September 3, 2012, the Shenzhen Municipal Cultural Market Administration Enforcement General Task Force conducted a raid on an illegal hard drive “loading” service supplier in Longgan District in Shenzhen. Seven computers, one notebook, two servers (each equipped with 24 hard drives of 1-2 TB each), one router, 45 hard disks and related business records were seized. One female computer operator and one male courier were taken into custody for questioning. During the preliminary search at the scene more than 1,000 movies and TV episodes indexed on one of the computers were found, of which more than 500 titles were infringing U.S. movies/TV shows. After the investigation, the police claimed that the evidence did not meet the criminal threshold requirement hence no criminal charges were filed and the two offenders were let go with a warning.

<sup>27</sup>Physical piracy harms the legitimate markets for all IIPA members but in different ways. For the independent film producers, physical piracy of DVDs remains a significant export constraint for independent producers and distributors, the majority of which are small- to medium-sized businesses. Independent producers partner with local authorized distributors to finance and distribute film and television programming. These authorized distributors find it nearly impossible to compete with pirates and report that both physical and Internet-based piracy have significantly contributed to the demise of what was left of the home video market in China. Producers and distributors confirm that DVD sales have been particularly impacted since pirated digital copies are offered for free online and with a similar quality viewing experience that a DVD can provide. Unable to compete with free, legitimate distributors often cannot commit to distribution agreements or they offer drastically reduced license fees which are inadequate to assist in financing of independent productions. Piracy undermines and may permanently damage legitimate distribution networks essential to reaching consumers and leaves little confidence for investment in intellectual property in China.

<sup>28</sup>Previous IIPA submissions have described in greater detail the number of factories, production over-capacity, inter-changeable production methods (e.g., from music CD to DVD), and fraudulent practices (such as false marking of VCDs or DVDs as “Blu-ray”). In May 2011, the recording industry obtained positive forensic examination reports from the “PRC Police Bureau for Disc Production Source Identification Center” implicating three optical disc plants. These reports were submitted to GAPP which reportedly initiated criminal investigations into the plants with the PSB. The recording industry was later informed that the PSB intended to initiate a criminal investigation into an optical disc plant in Sichuan. Copyright verification reports and an affidavit regarding the lack of a license were submitted to support the case in early 2012, but updates on the status of the case are not available despite repeated requests.

discs, either retail or industrial, using disc drives or towers; production and/or sale of pirate videogames and circumvention devices used for games; the production in China (generally for export) of high-quality counterfeit packages of software, music, movies, or games;<sup>29</sup> the loading of pirate music on karaoke machines; and sales of “media boxes” as discussed above.<sup>30</sup> The piracy levels for video and audio in physical formats, continue to range between 90% and 95% of the market. A noted problem remains shops in cosmopolitan areas in Shanghai and Beijing where pirated “AV” shops heavily target expatriate communities in China.<sup>31</sup> Recidivism is endemic. As an example, an “AV” shop and corner stand inside Beijing’s Silk Street Market to this day openly sells a large quantity of pirated optical discs, even after several “crackdowns” by law enforcement. The U.S. government and industry have noted in the “Notorious Markets” filing several markets which remain active and open for pirate and counterfeit business, including *China Small Commodities Market (Yiwu)*, *Luohu Commercial Center (Shenzhen)*, *Buynow PC Mall* (a very large personal computer mall chain in China, operating 22 stores across the country, known for selling computers with illegal operating system software and other unlawfully pre-installed software), the *Silk Market (Beijing)*, and *San Li Tun District (Beijing)* (where most shops openly sell infringing movies and television programs). Test purchases made at *Guangdong Audio Video Centre* in 2011 also indicated that pirate audiovisual products can still be easily found, and the wholesaling centre in Guangzhou is replete with pirate audiovisual materials.

Regarding enforcement against pirate optical disc plants, right holders have experienced procedural problems, since positive forensic matches of a pirate optical disc with an “exemplar” collected from the replication plant are needed to prove a *prima facie* case against the plant in China. However, in cases where positive forensic matches have been made and investigations by the authorities have been initiated, copyright owners are most often not informed of the status of the cases. Anecdotally, industry reports that most pirate optical discs identified have fake source identification (SID) code but features found in the pirate product indicate that they are manufactured in China. The existence of such product reflects either that underground plants have gone undetected by the GAPP, or that certain registered replication plants in China are taking the risk to manufacture pirate products. Unfortunately, law enforcement agencies have been unwilling to take up cases where no forensic match is available, and thus, industry has also seen fake mould codes used in pirate products to avoid detection. Right owners also report that Customs officials will not take *ex officio* actions regarding pirate optical discs, instead suggesting with regard to exports of discs that right owners file recordation to facilitate detection. Such a recordation system is unwieldy, since many right holders own thousands of titles and each recordation involves an administration fee of several hundred RMB.

**Media Box Piracy:** A new business model has emerged in China involving media boxes facilitating remote access to music videos, karaoke, audiovisual, and other creative materials. These boxes are being manufactured in China and exported to overseas markets throughout Asia. This next generation piracy threatens not only the Chinese market for content but is exported from China, harming other markets. For example, one of the well known products is called *AsiaBox*, which is a media box that enables streaming and downloading of online audio and visual content. A total of 70 applications are made available at the “Apps Market” of *AsiaBox* for installation. *AsiaBox* provides online streaming of content from sites like *PPSLive* and *PPStv* which are popular P2P online services in China. Three different companies are distributing *AsiaBox* in Malaysia, Singapore and Taiwan but *AsiaBox* can also be used in countries such as Japan, Australia, Hong Kong, China, and elsewhere. Right holder groups know that the country of origin of the product is China, though the details of manufacture are unavailable.

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<sup>29</sup>China remains a source country for manufactured counterfeit optical discs (particularly music box sets), harming markets in Hong Kong, Macau, Singapore, the Philippines, Russia, and the United Kingdom, the United States, and elsewhere.

<sup>30</sup>Media boxes, which can be plugged directly to TVs, facilitate easy access to remote online sources of unauthorized entertainment content including music, movies and TV dramas. Such media boxes are not only sold in China but also in Malaysia, Singapore and Taiwan and are believed to have been manufactured in China.

<sup>31</sup>U.S. Embassies have been helpful in spreading the word throughout the Embassy communities and to U.S. expatriates not to engage in the purchase of pirated or counterfeit merchandise. Such initiatives by the U.S. and other Embassies should be strengthened, and the Chinese government can assist by posting notices in airports and ports indicating that the export of pirated or counterfeit material out of China, and the importation of such materials into most countries, is illegal.

**Illegal Camcording:**<sup>32</sup> The number of forensic matches from illegal camcords of Motion Picture Association of America (MPAA) companies' major motion pictures traced to Chinese theaters in 2012 increased to ten (up from nine in 2011). Camcording piracy is a source of pirate films on major Chinese UGC sites and provides source material for infringing DVD masters. SARFT should immediately implement watermarking of theatrical prints and ensure that China Film Group and other exhibitors step up efforts to deter illegal camcording. The Copyright Law should be amended to add as a violation of law the use of, or attempt to use, an audiovisual recording device to make or transmit a copy of a cinematographic work or other audiovisual work, or any part thereof, from a performance of such work in an exhibition facility. Anyone committing this act should be subject to civil, administrative, and criminal remedies. Barring this, NCAC should coordinate with SARFT or through the State Council to ensure that the China Film Industry Promotion Act is amended to prohibit unlawful camcording. There is evidence that such a statute is needed in China, as the first camcording case in China (in November 2008), involving a Chinese film, resulted in the three suspects being released by the police. Chinese industry associations have been very cooperative working with the local MPAA in investigations and trainings, but Chinese government involvement is needed.

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

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

## **ADDITIONAL ENFORCEMENT OBSERVATIONS IN CHINA**

In addition to the enforcement issues related to the specific areas of piracy recounted above, there are also cross-cutting enforcement concerns affecting all the industries. Most notably, an overall lack of deterrence persists due to various factors, including over-reliance on the administrative enforcement system, difficulty in obtaining effective evidence and preserving it for criminal transfer, lack of transparency, and difficulty in obtaining deterrent

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

criminal convictions. These deficiencies exist notwithstanding continued good relationships with China's law enforcement and a willingness to cooperate with foreign right holders. In general, right holders report criminal law enforcement in China against piracy did not significantly improve in 2012 except in a few notable cases,<sup>33</sup> as police authorities devoted more efforts in dealing with counterfeit drugs and shoddy food products. The Chinese government must send a strong message that piracy of all forms will not be tolerated by enforcing against key bad actors, including criminal enforcement to meet its TRIPS Article 61 requirements and drive down piracy levels. The following recount some specific enforcement hurdles that remain bottlenecks in the Chinese system.

**Criminal Thresholds:** IIPA has long complained about the unreasonably high thresholds for criminal liability under the laws, ancillary regulations, and previous Judicial Interpretations. Unfortunately, the thresholds remain too high to criminalize all piracy on a commercial scale as required by the TRIPS Agreement, and in practice, the thresholds are not being followed consistently by Chinese government authorities. As a case in point, many law enforcement agencies in China fail to follow the "500 copy" threshold (as set forth in the April 2007 SPC/Supreme People's Procuratorate JI) to prosecute infringing shop owners. However, according to some in the industry, this is slowly improving and now the Chaoyang District of Beijing, along with several other judiciary districts in China are more regularly prosecuting illegal optical disc vendors according to the threshold.<sup>34</sup> Unfortunately, other provinces and districts are not following the threshold. The January 2011 *Supreme People's Court, Supreme People's Procuratorate and Ministry of Public Security Promulgated Opinions on Certain Issues Concerning the Application of Laws for Handling Criminal Cases of Infringement of Intellectual Property Rights* (Criminal IP Opinions) appear to set out some important elements for Internet and related criminal cases and help clarify and address other ongoing issues related to criminal liability in China. The Opinions set out important clarifications with regard to thresholds for criminal liability. While it is yet to be seen how these new thresholds will be interpreted in practice, they appear to provide some flexibility and it is hoped they will ease the evidentiary burden to prove criminal liability in the online space.

The Criminal IP Opinions provide several criteria upon which the threshold for criminal liability can be met:

- illegal operation costs amount to over RMB50,000 (US\$8,020);
- disseminating over 500 copies of third parties' works (the "aggregate quantity of others' works being transmitted is more than 500 pieces");
- disseminating third parties' works with the actual number of clicks amounting to over 50,000 ("[w]here others' works being transmitted has been actually clicked for more than 50,000 times");
- disseminating third parties' works in a membership system with the number of members amounting to over 1,000;
- if the amount or quantities listed in the first four categories above are not met, but more than half of the amount or quantities in two of the above categories are met;
- in case of other serious circumstances.

Whereas the previous numerical threshold was "500 copies" it now appears possible to prove a combination of elements, e.g., proof of "250 copies" combined with proof of 25,000 downloads, for criminal liability, or as another example, in the case of a membership site, proof of 500 members combined with proof of dissemination of "250 copies." The Copyright Law amendment should specify that "copy" includes a download, so that the Opinions do not become an impediment for right holders in bringing criminal cases against copyright violators on the Internet. In addition, the decision as to whether the threshold is met should be vested with the Procuratorate, rather than with the MPS or PSB, since reports indicate MPS and PSB have refused to accept cases on the basis of onerous evidentiary requirements. MPS and PSB do appear, however, to be investigating the illegal gains of website operators and collecting evidence directly from advertising platforms and agencies, which is a positive sign.

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<sup>33</sup>Exceptions include the "Radish Garden" online software piracy case in Shanghai, the "Shang Yajun" counterfeit software case in Beijing Haidian District, and the cracking down on four counterfeit software groups in Shenzhen.

<sup>34</sup>The motion picture industry regularly helps the authorities from this District with "title verifications" in order to prosecute such cases. The industry indicates an average of 10 prison sentences have been meted out annually against illegal audiovisual shop owners.

**Problems with Reliance on Administrative Enforcement:** The significant hurdles in bringing civil and criminal enforcement actions in China has led to an over-reliance on non-deterrent administrative enforcement measures. Administrative enforcement, without the risk of criminal prosecution, has little effect against commercial pirates that have neither legitimate business enterprise nor any assets. The Chinese government has ironically failed to employ available administrative measures with respect to infringers for whom administrative measures might be effective, such as in the case of Internet infringements, where maximum daily fines, if employed, could have a devastating effect on the ability of online infringement models to operate. IIPA members also find administrative enforcement authorities inconsistent in their handling of foreign right holder complaints. For example, enforcement agencies in the provinces of Anhui, Jiangsu, and Zhejiang Provinces have been more cooperative and efficient in handling foreign right holder cases in recent years. However, the software industry's experience is different – it seems there are only very few cities, including Beijing, that will accept complaints against enterprise end-user piracy and most other regions do not accept such cases at all. There also remain problems in transfer of administrative cases for criminal prosecution. For example, regarding Internet cases, since there is a different standard of proof in a criminal case as in an administrative case, right holders sometimes find that evidence collected by administrative authorities may become inadmissible. IIPA urges greater coordination between administrative authorities and the Public Security Bureaus at the outset of the handling of a potential copyright criminal case.

**Burdensome and Costly Documentary Requirements Stymie Some Foreign Right Holders:** Foreign publishers have complained about the requirement to submit not only a notarized and legalized power of attorney, but also a notarized and legalized copyright registration certificate and certificate of legal representative. All of these documents have to be translated by a qualified translation organization. Further, in some legal actions, Chinese authorities require software owners to obtain a certification of copyright in the software from the local copyright authority. As previously reported, a copyright-owner/publisher brought suit against three different entities in China that were systematically republishing information from the publisher's proprietary database and related publications on a daily basis, and in direct competition with the publisher's own information service. Meeting the evidentiary burdens to prove the legitimate publisher's ownership of the infringed materials cost hundreds of thousands of dollars in legal fees. Unfortunately, the damages recovered were so small as to be non-deterrent, and represented only a fraction of the costs incurred by the publisher in bringing the actions.

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

## **COPYRIGHT LAW AND REGULATIONS UPDATES**

The Copyright Law of the People's Republic of China, subordinate regulations, judicial interpretations, various rules, and "opinions," provide the basis for copyright protection in China.<sup>35</sup> The Chinese government has

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<sup>35</sup>Currently, copyright is governed by the basic law, the Copyright Law of the People's Republic of China (as last amended in 2010) ("Copyright Law"). In October 2001, the Standing Committee of the National People's Congress adopted the "Decision to Amend Copyright Law of the People's Republic of China," thereby amending the 1990 Copyright Law of the People's Republic of China. Copyright Law of the People's Republic of China, Adopted at the Fifteenth Session of the Standing Committee of the Seventh National People's Congress on September 7, 1990, Amended in Accordance with "Decision to Amend Copyright Law of the People's Republic of China," Adopted at the Twenty-fourth Session of the Standing Committee of the Ninth National People's Congress on October 27, 2001. The Copyright Law was further amended in 2010 to make minor changes to come into compliance with a decision of a World Trade Organization Panel. See "The Decision of the Standing Committee of the National People's Congress on Amending the Copyright Law of the People's Republic of China, adopted at the (...continued)

taken some significant steps in the past year toward establishing a stronger legal framework for the protection of copyright. The Chinese government is currently in the process of revising its Copyright Law, Criminal Code, and many related laws, and just passed new rules to deal with online infringements. These revision processes provide important opportunities to update the legal regime in China for more effective copyright protection and enforcement.

**Supreme People's Court Issues "2012 Network Rules" to Deal With Online Infringements:** On November 26, 2012, the SPC issued long-awaited *Judicial Rules on Several Issues concerning the application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right to Network Dissemination of Information* (2012 Network Rules or Rules).<sup>36</sup> IIPA applauds the SPC for its issuance of the Rules, which went into force January 1, 2013, and which aim to improve the existing legal framework on the protection of online (information network) dissemination rights provided for in the Copyright law and in State Council regulations. The 2012 Network Rules provide relatively clear guidance for courts as to how to deal with ISP liability issues in civil cases (and replace the *Regulations on the Protection of the Right of Communication through Information Networks* in effect since July 1, 2006). We look forward to seeing these rules implemented in practice and hope that their effect will be immediate and robust, and will help to transition what is currently an internet landscape dominated by theft to a legitimate online marketplace.

**Draft Copyright Law Amendments at State Council:** In late 2011 and throughout 2012, NCAC engaged in a several-part drafting exercise for an overhaul and modernization of the Copyright Law. IIPA and various copyright industry associations and companies have provided comments. In October 2012, the third draft was apparently completed but was not made available for public comment. Many important topics were taken up in the second draft Copyright Law revision, and reportedly remain in the third draft, including setting forth liability principles for the online environment that appear aligned with the 2012 Network Rules.<sup>37</sup> In addition, the draft apparently also includes: 1) coverage of reproductions in the online environment; 2) the communication to the public right (including an interactive making available right as contemplated under the WIPO "Internet" Treaties, the WCT and WPPT); 3) technological protection measures (TPMs); 4) rights in broadcasts; 5) computer program protection provisions; 6) remedy provisions including an increase in statutory damages and punitive damages for repeat infringements,<sup>38</sup> and the addition of criminal remedies for the first time; 8) collective management; and 9) exceptions.

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

<sup>36</sup>*Rules of Supreme Court on Several Issues Concerning the Application of Law in Adjudication of Civil Disputes Related to Infringement of Right of Communication over Information Networks*, Approved at No. 1561 Meeting of the Supreme People's Court Adjudication Commission held on November 26, 2012. In effect as of January 1, 2013, Fashi (2012) No. 20.

<sup>37</sup>The draft reportedly still attempts to adopt into the structure of this basic law some principles for determining the joint liability of service providers in the online environment (the second draft created aiding and abetting-type liability for services that abet or instigate infringements including non-hosted infringements of third parties), and reportedly aligns very closely to the 2012 Network Rules.

<sup>38</sup>Statutory damages are reportedly increased to maximum of RMB 1 million in the third draft, and punitive damages are provided for repeat infringements, at 2 to 3 times the damages amount.

Some of the current proposals need to be carefully considered and revised before enactment to avoid conflicts with China's WTO obligations. In particular, IIPA has identified potential issues with the proposed changes related to: 1) software protection (both definitions as well as a potentially harmful compulsory license); 2) evidence preservation orders; 3) *ex parte* civil search orders; 4) confiscation of tools and materials used in infringing activity; 5) a compulsory reprint license; 6) recovery of costs and attorneys' fees; 7) statutory/compulsory license provisions;<sup>39</sup> and in particular, 8) a compulsory license to create compilations. In addition to the above, we urge the Chinese government to take other important steps such as to increase statutory damages for copyright infringement and provide for criminal liability for enterprise end-user software piracy, hard disk loading piracy and the circumvention of technological protection measures.

Regarding collective management, reportedly, the third draft still introduces extended collective management, although the scope of extended collective licensing is limited to licensing of the use of karaoke works only in the third draft, which is an improvement over the first two drafts. It is a matter of great importance that extended collective licensing should not be introduced at this stage of development of the market for any categories of works.<sup>40</sup> The draft apparently still contemplates "single window licensing," so in the case two or more collective management organizations (CMOs) are collecting royalties from the same user, the CMOs are required to consult and agree in advance which of the CMOs would be responsible for the collection of the total royalties. In addition, the set up of CMOs reportedly requires approval of and supervision by NCAC regarding the establishment, modification, cancellation or other matters of regulations of the CMO. The requirement for pre-approval of tariffs with the Chinese Copyright Administration should not be introduced. CMOs should be allowed to determine their own tariffs in a manner that reflects the market value of their members' rights. IIPA's view is that further revisions in relation to CMOs are needed to address these deficiencies.

IIPA looks forward to the further opportunity to review the draft after being passed from NCAC to the State Council Legislative Affairs Office (SCLAO) in October 2012. SCLAO may then further amend the Bill and will pass the final version to State Council for approval, and the State Council approved version may then be sent to National People's Congress for review and enactment in 2013 or 2014.

**Criminal Law and Related Ancillary Regulations, Etc.:** IIPA has contended for many years that a credible criminal remedy in China (under Articles 217 and 218 of the Criminal Law and accompanying Judicial Interpretations) is needed to effectively curtail piracy and related violations in all their forms. Remaining gaps include thresholds that are too high (in the case of illegal income) or unclear (e.g., in the case of the copy threshold), proof requirements that may leave some critical commercial scale infringements without a remedy (e.g., the requirement to show that the infringement is carried out "for the purpose of making profits" which is undefined and in certain circumstances, like many forms of internet piracy, as well as enterprise end-user software or hard disk loading cases, it is difficult for law enforcement authorities or right holders to prove that the infringer is operating for the purpose of making profits), the failure to cover all piracy on a commercial scale as required by TRIPS Article 61,<sup>41</sup> the failure to separately define criminal violations related to the WCT and WPPT (e.g., violations involving TPMs), the limited criminal accomplice liability with respect to imports and exports (with lower penalties available), and uncertainties with respect to repeat offenders (the 1998 Jis included repeat infringers but were inadvertently not included in the 2004 JIs). The January 2011 *Supreme People's Court, Supreme People's Procuratorate and Ministry of Public Security Promulgated Opinions on Certain Issues Concerning the Application of Laws for Handling Criminal Cases of Infringement of Intellectual Property Rights* set out some important elements for Internet and related criminal cases and help clarify and address other ongoing issues related to criminal liability in China.<sup>42</sup>

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<sup>39</sup>A statutory license for the use of released musical works for broadcasting has reportedly and disturbingly been re-introduced in the third draft; it had been removed in the second draft.

<sup>40</sup>The concept of collective management is relatively new in China and existing CMOs may not have the necessary experience to deal with all aspects of licensing on behalf of their members. Right holders have concerns with respect to the transparency, governance and distribution practices of existing CMOs in China.

<sup>41</sup>For example, China fails to criminalize satellite, cable and broadcast piracy, bootlegging and a number of other acts of piracy when they are "on a commercial scale."

<sup>42</sup>IIPA does not at present possess a full English translation of the Opinions, but we have received summaries and refer to these herein. In addition to internal summaries, we draw points from Richard Wigley, *New Guidelines for Criminal Prosecutions of Online Copyright Infringement Provide Aid in Fight against Online* (...continued)

Importantly, and consistent with the liability provisions in the 2012 Network Rules, the Opinions appear to confirm criminal liability against a web service which does not directly receive revenues from the dissemination of copyright material, but which charges fees indirectly through “non-free advertisements.” This clearer understanding of “for the purpose of making profits” in the Criminal Law is welcome. What remains to be seen is how various hosted or non-hosted piracy situations will be regarded under Article 10 or 15 of the Opinions. For example, the second prong of Article 10 seems clearly aimed at infringements over user-generated content sites on which there is paid advertising. Article 15 would appear to reach one-click hosting sites over which infringement takes place (“network storage space”), infringing streaming sites (“communication and transmit channels”), web-hosting services, ISPs and payment processing companies. It is hoped the Opinions will also address IPR violations on auction websites dealing in hard goods piracy targeted toward foreign markets and services providing access to infringing content through deep links, and that the Opinions can address repeat infringers. To the extent they do not, coverage of such should be confirmed in other laws or regulations. It also remains to be seen how Article 10 (“[o]ther circumstances that make profits by taking advantage of others’ works”) will be interpreted. It is important to note that the Opinions are not limited to the online environment (dealing with other IPR crimes), and it is hoped that, for example, enterprise end-user piracy of software, which is clearly a circumstance which results in increased profits for an enterprise by taking advantage of others’ works, may be regarded as a crime under these Opinions. In the very least, the language lays the groundwork for such liability. The Opinions also set out important clarifications with regard to thresholds for criminal liability, discussed above.

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

**TRIPS/Berne Obligation to Pay for Broadcasts of Musical Compositions:** China has long been in violation of its TRIPS/Berne Convention obligation to compensate copyright owners for the broadcast of musical compositions.<sup>43</sup> In late 2009, the State Council publicly announced that commencing January 1, 2010, China’s broadcasters must begin making payments to copyright owners of musical compositions (songwriters and music publishers, through performing rights societies). The *Measures on the Payment of Remuneration to the Copyright Owners of Audio Products* were intended to correct this longstanding TRIPS/Berne Convention violation to compensate copyright owners for the broadcast of musical composition. However, such payments are wholly inadequate and the tariff would result in one of the lowest payment rates in the world. Broadcasters could either choose to pay right holders based on very low percentage of a station’s advertising revenue or pay RMB0.3 (US\$0.05) per minute for music played on the radio or RMB1.5 (US\$0.24) for TV. Advertising revenue for Chinese broadcasting was reported to be US\$10.16 billion in 2008.<sup>44</sup> Since music performing rights payments in most countries are calculated as a percentage of such revenue, and it is estimated that 15% of music heard on Chinese broadcasting is U.S. music, the payment scheme is clearly tens of millions of dollars below what would be a fair rate. IIPA has urged that the new tariff be retroactive, at least to the date of China’s joining the WTO, but the new tariff is prospective only. In the 2011 JCCT, the Chinese government agreed to “hold government/industry roundtables in China to discuss online copyright protection and enforcement, including library copyright protection,” and agreed that an exchange will also be set up to deal with issues related to music “broadcast tariff rates” in China.<sup>45</sup>

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*Piracy*, China Law Insight, January 19, 2011, at <http://www.chinalawinsight.com/2011/01/articles/intellectual-property/new-guidelines-for-criminal-prosecutions-of-online-copyright-infringement-provide-aid-in-fight-against-online-piracy/>. See also Supreme People’s Court, Supreme People’s Procuratorate and Ministry of Public Security Promulgated Opinions on Certain Issues Concerning the Application of Laws for Handling Criminal Cases of Infringement of Intellectual Property Rights, Watson & Band, January 13, 2011, at [http://www.watsonband.com.cn/news/detail?id=182&language=en\\_US](http://www.watsonband.com.cn/news/detail?id=182&language=en_US).

<sup>43</sup>The recording industry also notes the desirability of a workable remuneration system for the public performance or other communication/broadcast of their recordings. With the increase in playing of recorded music in commercial premises as a primary form of commercial exploitation of music, public performance, communication to the public and broadcasting income is becoming a major potential source of revenue for record producers.

<sup>44</sup>*On Screen Asia, China in Focus*, April 1, 2009, at <http://www.onscreenasia.com/article-4897-chinafocus-onscreenasia.html>.

<sup>45</sup>See 21st U.S.-China Joint Commission on Commerce and Trade Fact Sheet, December 2011, at <http://www.commerce.gov/node/12467>.

**Other Regulations:** IIPA is also monitoring other regulatory developments, such as the MIIT proposal in June 2012 to revise the Draft Internet Administration Rules aimed at strengthening the regulation on online services such as forums and *weibo*. We are also aware of the State council adoption of Opinions on the Convergence Between Administrative Law Enforcement and Criminal Justice in the Work of Combating IPR Infringement and Selling Counterfeit and Shoddy Goods, issued on September 13, 2012. These Opinions provide guidelines/procedures for administrative law enforcement agencies and public security organs to handle evidence of infringement and counterfeiting offenses detected. We understand the full text of the Opinions are not available to the public, however. Finally, IIPA has been monitoring Draft Guidelines for the Implementation of the Anti-Monopoly Law, issued in August 2012. There are two potentially concerning provisions, one related to collective management organizations and one related to the use of technological protection measures. In short, IIPA views it as important that CMOs be permitted to operate without Chinese government interference and that normal day-to-day operations of CMOs should not be viewed as anti-competitive. Similarly, the use of TPMs on copyright materials should not be presumed to be an unreasonable restraint on competition.

## **MARKET ACCESS AND RELATED ISSUES**

IIPA has consistently stressed the direct relationship between the fight against infringement and the need for liberalized market access to supply legitimate product (both foreign and local) to Chinese consumers. Last year saw progress for some industries in the struggle to achieve market access. The February 2012 U.S.-China Film Agreement has already borne some fruit such as increased revenues for those films that secured quota slots, an uptick in licensing to Chinese distributors as well as numerous U.S.-Chinese co-productions, and the December 2011 amendments to the Catalog of Foreign Investment Guidelines promises to open the market for several creative product categories, creating new opportunities for foreign right holders. We recognize the Chinese government for having taken these important steps, although significant restrictions remain for many copyright industries.

**U.S.-China Film Agreement:** In February 2012, the United States and China reached an historic deal, in which the Chinese agreed to: 1) permit the importation by SOEs and the theatrical distribution of at least 34 foreign films into China annually on a revenue-sharing basis (up from 20 films), with the 14 additional films initially entering China in “enhanced formats” such as 3D or IMAX; 2) increase the percentage of revenue shared with the foreign producer to 25%; 3) actively promote and license Chinese companies to engage in national theatrical distribution providing competition in the market; 4) increase transparency to the administration of its content review process; and 5) observe commercial terms, consistent with the terms prevailing in comparable markets, in any contract for the distribution of “films other than revenue sharing films.” China has begun its implementation of the Film Agreement, which holds promise of greater predictability and increased access to the Chinese marketplace on more favorable terms for U.S. films. A couple of new problems have emerged, stemming mainly from measures purportedly aimed at protecting China’s domestic industry share of the film market. Chiefly among them were two month long periods during which no foreign films were scheduled for release and simultaneous release dates imposed upon major U.S. motion pictures (so-called “double-booking”).<sup>46</sup> While these serious issues appear to be resolved, the government must not permit discriminatory practices to reemerge or the potential gains out of the accord between the U.S. and the Chinese governments on the issue of film distribution in China will not be achieved. It has been almost a year since the Agreement was struck, and the two countries have agreed to consult and review the Agreement after five years to ensure it is working as envisioned. If necessary, the United States can return to the WTO to seek relief and it is hoped that the Chinese will vigorously and comprehensively implement the Agreement to achieve the agreed upon goals of a more robust Chinese marketplace and a transparent non-discriminatory distribution infrastructure.

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<sup>46</sup>The blackouts are unpredictable and the “double-bookings” force the limited supply of imported foreign films to compete head-on against each other, effectively cannibalizing the box office receipts for each film. Such restrictive release patterns present serious problems for U.S. right holders, who are prohibited from directly engaging in local marketing of a film until its release date is announced, often leaving only a limited period of time to promote the film’s release, further reducing the potential box office receipts. Similarly, Chinese film producers are negatively impacted by these sporadic release patterns, as they are forced to adapt to inflexible scheduling on short notice.

**WTO Market Access Case Implementation:** In the landmark market access case (DS 363) brought by the U.S. in 2007 and which concluded in 2009,<sup>47</sup> the United States prevailed on many claims against China's regime restricting the importation (trading rights) and distribution of publications, sound recordings, audiovisual home entertainment, and films for theatrical release. As a result of the case, China must:

- allow U.S. companies to import freely into China (without going through the government monopoly) films for theatrical release, DVDs, sound recordings, and books, newspapers, and periodicals. This is a significant market opening result.
- provide market access to, and not discriminate against, foreign companies wishing to distribute their books and periodicals, electronic publications, audiovisual materials and sound recordings, including through sound recording distribution services and electronic distribution products in China.<sup>48</sup>
- discard discriminatory commercial hurdles for imported reading materials, sound recordings intended for electronic distribution, and films for theatrical release.<sup>49</sup>

On December 24, 2011, China's National Development and Reform Commission (NDRC) and Ministry of Commerce (MOC) jointly issued a newly revised version of its Foreign Investment Industries Guidance Catalogue. The Catalogue went into effect on January 30, 2012. As a result, at least on the books, importation of "books, newspapers and periodicals," as well as "audio-visual products," "electronic publications," and online music, have been moved off of the "prohibited" investment list (although audio-visual products remain on the "restricted" list). The amended Catalogue goes part of the way toward meaningfully implementing the WTO Market Access case. IIPA urges the U.S. government to stock-take as to these and other steps the Chinese government has taken to ease any WTO-incompatible restrictions and take other market-opening steps.<sup>50</sup>

**Discriminatory Censorship Practice With Respect to Sound Recordings (and AV Works):** For several years, IIPA has complained that U.S. (and other foreign) right holders in music have to go through an onerous and discriminatory censorship review process from Chinese right holders with respect to online music. While the WTO Panel and Appellate Body, in a technical finding, concluded that they lacked sufficient information to determine

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<sup>47</sup>China – Measures Affecting Trading Rights And Distribution Services For Certain Publications And Audiovisual Entertainment Products, WT/DS363/AB/R, December 21, 2009, at <http://www.wto.org>. The U.S. government requested consultations in this case on April 10, 2007, supported by the China Copyright Alliance (a coalition consisting of MPA, IFTA, RIAA, IFPI and AAP).

<sup>48</sup>Specifically, China must fix its measures in ways which will: open its market to wholesale, master distribution (exclusive sale) of books and periodicals, as well as electronic publications, by foreign-invested companies including U.S. companies; permit sound recording distribution services, including electronic distribution, by Chinese-foreign contractual joint ventures, including majority foreign-owned joint ventures; allow the participation of foreign capital in a contractual joint venture engaged in the distribution of reading materials or audiovisual home entertainment products; ease commercial presence requirements for the distribution of DVDs; and do away with China's 15-year operating term limitation on foreign joint ventures.

<sup>49</sup>For example, China must not improperly and discriminatorily limit distribution for imported newspapers and periodicals to "subscriptions," and must not limit such materials and other reading materials to Chinese wholly state-owned enterprises, and may not limit the distributor of such reading materials to a State-owned publication import entity particularly designated by a government agency. China may also not prohibit foreign-invested enterprises from engaging in the distribution of imported reading materials.

<sup>50</sup>IIPA would be interested to know, for example:

- 1) steps being taken to provide a simple process for foreign enterprises to exercise their publication importation rights, and confirm that certain parts of the Regulations on Administration of Publishing (for example, Article 42) do not create new requirements on foreign enterprises to exercise their importation rights as to publications;
- 2) how Chinese laws provide market access to, and do not discriminate against, foreign companies wishing to engage in wholesale, master distribution (exclusive sale) of books and periodicals, as well as electronic publications, and allow the participation of foreign capital in a contractual joint venture engaged in the distribution of reading materials or audiovisual home entertainment products;
- 3) how Chinese laws allow foreign-invested enterprises to engage in the distribution of imported reading materials;
- 4) how Chinese laws ease commercial presence requirements for the distribution of DVDs; and do away with China's 15-year operating term limitation on foreign joint ventures;
- 5) how Chinese laws discard discriminatory commercial hurdles for imported reading materials, sound recordings intended for electronic distribution, and films for theatrical release, and in particular, how the laws avoid: improperly and discriminatorily limiting distribution for imported newspapers and periodicals to "subscriptions"; limiting such materials and other reading materials to Chinese wholly state-owned enterprises; and limiting the distributor of such reading materials to a State-owned publication import entity particularly designated by a government agency; and
- 6) how the revised GAPP rules on imported subscription publications ease the ability for persons in China to subscribe to imported publications, including those in the so-called "non-limited category," and how an individual wanting to subscribe to an imported publication may submit a subscription application to the publisher or distributor directly.

whether this discriminatory censorship regime with respect to online music violated China's General Agreement on Trade in Services (GATS) commitments, this was not a "green light" for the Chinese government to continue its discriminatory censorship practices. China's discriminatory regime is unfair and highly suspect under WTO rules. Promulgation of the September 2009 Circular on Strengthening and Improving Online Music Content Examination only exacerbated and complicated the issue by putting into place a censorship review process premised on an architecture ruled to be in violation of China's GATS commitments, namely, that only wholly-owned Chinese digital distribution enterprises may apply for censorship approval.<sup>51</sup> The Circular violates China's WTO commitments under GATS to provide nondiscriminatory market access for foreign suppliers of sound recording distribution services; it violates China's commitments on trade in goods under the General Agreement on Tariffs and Trade 1994 (GATT); and it violates China's Accession Protocol commitment to authorize trade in goods by any entity or individual. China must revoke or modify the Circular to avoid making the country subject to an immediate challenge at the WTO. A set of newly amended Measures on the Administration of Importation of AV Products (2011), introduced a new definition for the term "publication of audio-video product" to include "dissemination via Information Network." As a result, the Measures impose an additional, duplicative, and possibly confusing layer of censorship on online music.

**"Network Publications Service Management Regulations" Draft Contains Potentially Concerning Market Access and Censorship Provisions:** In December 2012, the General Administration of Press and Publications (GAPP) released for comment a draft set of "Network Publications Service Management Regulations," in addition to two other proposed measures.<sup>52</sup> The draft Network Publications Regulations contain some positive elements related to online copyright protection, but also almost entirely exclude foreigners from "network publishing services" in China (even "cooperation" must be approved by GAPP),<sup>53</sup> and contain potentially onerous censorship provisions.<sup>54</sup> The music industry is concerned that these draft Regulations would, if finalized, create confusion in the market, since, for example, it is unclear whether approval for network distribution will have to be obtained both from the Ministry of Culture (as required under the Circular) and/or from the Publication Importation Unit (as required under the Draft Rules). The publishing industry raised concerns regarding the draft measures, the additional or new restrictions they would impose on online or network publishing, and how they might implicate China's WTO commitments.

**Delays in Content Review of Entertainment Software Products/Ban on Consoles:** The entertainment software industry continues to face lengthy delays of weeks or sometimes even months in the GAPP censorship approval process, wiping out the already-short window for legitimate distribution of entertainment software products. The Chinese government also fails to immediately seize infringing copies of titles intended for release while they are still undergoing censorship review, resulting in inadequate protection and enforcement. In addition, an onerous ban on the sale and importation of videogame consoles remains a major barrier. The current ban on the sale and importation of electronic gaming devices (i.e., video game consoles), in effect since a 2000 Opinion on the Special Administration of Electronic Gaming Operating Venues, stymies the growth of the entertainment software sector in China and denies Chinese consumers the benefits of these technologies, including use of parental controls. The ban

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<sup>51</sup>Under the Circular, pre-release content examination procedures apply to imported online music products, whereas domestic online music products go through a post-release examination and filing procedure only. Further, titles for imported music products previously cleared by GAPP for publication in the physical format have to be submitted to MOC for additional content examination prior to online distribution, whereas for previously published domestic music products, a mere self-examination and filing by the domestic producer is sufficient. Imported music products and domestic music products should have the same treatment in relation to content examination.

<sup>52</sup>GAPP issued a notice related to the draft provisions on: 1) network publications service management; 2) news publishing industry standardized management (revised draft); and 3) administrative measures on foreign press and publishing institutions establishing an office in China (draft). These measures may touch upon WTO issues related to publishing as well as other industries. See <http://www.chinalaw.gov.cn/article/cazjgg/201212/20121200379100.shtml>.

<sup>53</sup>A number of articles limit the establishment of network publishing businesses. Most onerous is the provision prohibiting foreigners from engaging in network publishing services at all. Article 10 provides, "Sino-foreign joint venture operations, Sino-foreign cooperative operations and foreign-invested operations may not engage in network publishing services." Even cooperation involving foreigners must go through GAPP (the controlling entity of all activities).

<sup>54</sup>Two provisions target online games: 1) Article 25, which provides, "Before network games are published online, an application must be put forward with the provincial, autonomous region or municipal administrative publishing controlling department, after examination, verification and agreement, they are to be reported to the General Administration of Press and Publications for examination and approval;" and 2) Article 51, which provides, "Those who, without approval, engage in unauthorized network publishing services, or provide unauthorized network publications provided by foreigners, or publish unauthorized network games online (including network games authorized by foreign copyright holders), will be banned by the administrative publishing controlling department and administrative industry and commerce management department, according to statutory powers, according to the provisions of Article 61 of the 'Publishing Management Regulations,' and the local provincial-level telecommunications management department may cease allowing access and close the website."

has also been extended to development kits used in the creations and development of video games. The ban impacts not only foreign game publishers, but also domestic Chinese developers, who are unable to obtain such kits given the prohibition on their importation.

**Import Monopoly and Distribution Duopoly for Films/Master Contract:** While the WTO Panel and Appellate Body concluded that the China Film Group duopoly did not constitute a “measure,” and cited the lack of evidence that a third distributor had been denied upon an application from operating in the Chinese market, the decisions equally make clear that if a *de facto* duopoly exists as to foreign films only, China would be in violation of its WTO obligations. The decisions confirm that, to be consistent with WTO rules, China must approve legitimate applications for other theatrical film importers and distributors in China, a key step that would significantly open up this market to competition, and additionally, would open up to competition and negotiation the underlying agreements upon which foreign films are now distributed in China. Furthermore, such approval of other importers and distributors of foreign films in China along with the corresponding importation rules and processes should be applied in a transparent, timely, non-discretionary and non-discriminatory manner. By the terms of the U.S.-China Film Agreement, China affirmed that additional Chinese firms could be eligible to distribute foreign revenue sharing films and to move to approve and license such firms. This is an important step, and U.S. industry expects meaningful movement in 2013 to ensure a more competitive and robust marketplace.

Unfortunately, there remain a range of market access restrictions that affect most of the copyright industries. Chinese market access restrictions include:

- restrictions on the ability to engage fully in the development, creation, production, distribution, and promotion of music and sound recordings;<sup>55</sup>
- the inability to fully engage in the import and export, distribution, and marketing online of published materials in China;
- an onerous ban on the manufacture, sale and importation of videogame consoles;
- a range of policies that China has developed under the banner of promoting “indigenous innovation” that have the effect of discriminating against foreign software and other technology products or compelling transfers of technology and intellectual property to China in order to access the market;<sup>56</sup> and
- ownership and investment restrictions (some of which were addressed in the amendments to the Catalog of Foreign Investment Guidelines).

**Addressing Other Barriers and Discriminatory Industrial Policies, Including Indigenous Innovation:**

The Chinese government must continue to address other barriers and industrial policies, including indigenous innovation policies, that impose discriminatory requirements on foreign right holders and/or deny them the exercise of their IP rights, and must not erect or retain barriers to entry such as outright bans on products or services or other onerous requirements that shut out foreign right holders from the Chinese market.

**Indigenous Innovation:** Over the past several years, China has rolled out a series of policies aimed at promoting “indigenous innovation.” The apparent goal of many of these policies is to develop national champions by discriminating against foreign companies and compelling transfers of technology. Of particular concern are policies that condition market access on local ownership or development of a service or product’s intellectual property or aim to compel transfers of foreign intellectual property and research and development to China. A broad array of U.S. and international industry groups have raised serious concerns that these policies will effectively shut them out of the rapidly growing Chinese market and are out of step with international best practices for promoting innovation. IIPA shares these concerns and strongly believes that the best ways for China to further enhance its innovative capacity are to: further open its market to foreign investment; provide incentives to innovate by ensuring full respect for

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<sup>55</sup>For example, the recording industry notes that the MOC Circular dealing with online music contains a restriction on “exclusive licenses” of online music services. Currently, there are very few licensed services in China providing repertoire from non-local record companies. There should not be any problem for MOC to regulate these services and conduct anti-piracy actions against other infringing sites. Record companies should be free to choose their licensees.

<sup>56</sup>These policies limit market access for software and other IIPA member products and undermine the IP development of U.S. and other foreign copyright industries.

intellectual property rights including patents, copyrights and trademarks; avoid policies which establish preferences based on nationality of the owners of the intellectual property rights; and act forcefully and promptly to prevent misappropriation of such rights. Last year, the Chinese government announced they would be investing US\$1.7 trillion over the next five years in designated “Strategic Emerging Industries” (SEIs). This initiative, on top of a SPC Opinion on IP released in mid-December 2011 which seems to instruct lower courts to make decisions that assist domestic “cultural” industries, once again raised the specter of discriminatory policies. The 2011 JCCT outcomes included China’s commitment to eliminate catalogues or other measures by provincial and municipal governments and autonomous regions linking innovation policies to government procurement preferences. This follows Chinese commitments made in prior JCCT and S&ED negotiations to “delink” innovation policies from government procurement. At the 2012 S&ED, China made a broader commitment to treat IPR owned or developed in other countries on the same basis as IPR owned or developed in China. These commitments must be fulfilled to give copyright industries fair access to China’s vast procurement market.

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

***Local IP Ownership Requirements for Information Security Products Including Software:*** The “Multi Level Protection Scheme” (MLPS) imposes major restrictions on procurement of software and other information security products for an overly broad range of information systems the government considers sensitive. Among other requirements, procurements of such products are limited to those with IP rights owned in China. This applies to procurements by the government and increasingly to procurements by SOEs and others in the public sector. IIPA is concerned that the MLPS defines “critical infrastructure” in too broad a way, thus restricting foreign cyber-security products from the Chinese market based on nationality of the owner of the IP. This results in an undue market access restriction for foreign software and other information security products and will in many cases prevent information systems in China from procuring the most effective security tools to meet their needs. We welcome the commitment made by China in the 2012 JCCT that it will review and revise the MLPS rules through a process that will seek the views of all parties, including through dialogue with US parties.

***Additional Barriers for the Independent Film Industry:*** The independent film industry continues to experience limited access to the Chinese marketplace, although the expanded 34 foreign film quota system provides some additional opportunities for revenue-sharing. However, most independent films imported and theatrically distributed in China are on a non-revenue share basis. It remains the case that both the financial return and the license fees for the underlying films are massively eroded by the lack of qualified theatrical distributors who can adequately support a nationwide theatrical release and a relatively non-competitive and non-transparent marketplace. The lack of certainty in China’s censorship process for films causes unstable commercial transactions and poses a market access barrier to independent film producers. For example, local distributors have reported the inability to obtain official written responses from the censorship authorities and some continue to use a film’s censorship rejection as a way to avoid payment of license fees. Additionally, uncertainty regarding the releases of foreign and domestic films in China negatively impacts all independent film producers and their local Chinese distribution partners. As part of the U.S.-China Film Agreement, the Chinese government committed to actively promote and license qualified entities to engage in national theatrical distribution to create a competitive market where commercial terms prevail. It is critical that signals of this commitment begin to emerge in China. The hope is that comparable commercial terms in all licensing arrangements will increase the overall demand for films in China and more opportunities for independent foreign producers will rapidly stem from such increased competition.

# COSTA RICA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA again in 2013 recommends that Costa Rica be elevated to the Priority Watch List.<sup>1</sup>

**Executive Summary:** The year 2012 ultimately ended with little change in Costa Rica on the matters that have long been of concern to copyright owners, and proved to be a disappointing one in Costa Rica on several fronts. Over the course of the year, worsening attitudes among the general populace threatened to make decriminalization of copyright infringement a reality through proposed amendments to the *Ley de Observancia*. While those efforts ultimately appear to have failed, they demonstrated a pervasive lack of understanding among the Costa Rican public of the important role copyright plays for the country's own creative sector. Local software developers in Costa Rica are growing, selling, and exporting their goods, a fact that makes all the more disappointing the country's failure to tackle end-user piracy of software, for example by implementing government-wide software legalization, as required by the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR).

Pirated music accounts for more than half of the records sold or downloaded in Costa Rica. Meanwhile performers and record labels remain unable to collect payments from broadcasters for the performance of their works as provided in the copyright law. 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 issued decrees that foreclose important sources of revenue to the industry, forcing many to make detrimental decisions about their investments in the country. The resulting halt of payments pinches producers and artists already battered by high piracy rates and limited digital sales in the market. Government efforts to coordinate IPR enforcement policy slowed to a halt in 2012, as a unit specialized in IP within the local Prosecutor's Office expected to be launched officially in 2012 failed to materialize. Finally, major obstacles still remain in Costa Rica's court procedures that prevent effective and efficient copyright enforcement.

### **PRIORITY RECOMMENDED ACTIONS FOR COSTA RICA IN 2013**

- Withdraw support for the still-pending Bill No. 17,719, which implements reservations to international obligations that would result in denying compensation to U.S. performers and record labels, and require performance rights payments from commercial broadcasters to performing artists and record producers to resume immediately.
- Revise past government initiatives and push forward a decree to properly implement Costa Rica's remaining CAFTA-DR obligation to adopt Internet Service Provider (ISP) liability provisions, with speedier deadlines by which ISPs must forward notices to users for the unauthorized exchange of protected content over the Internet.
- Officially launch and support a new specialized IP Prosecutor's Office under the Attorney General.
- Implement in practice the software asset management practices in government agencies called for in the 2002 Decree and required by CAFTA-DR.

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<sup>1</sup>For details on Costa Rica's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2013SPEC301HISTORICALCHART.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2013 global issues, see our cover letter at <http://www.iipa.com/pdf/2013SPEC301COVERLETTER.pdf>.



## **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. Although iTunes began operations there in late 2011, this new source for legitimate music in Costa Rica resulted in only a modest rise in digital sales of sound recordings. In the first half of 2012, overall music sales still reflected a decrease of 21% compared to the same period in 2011. BSA | The Software Alliance (BSA) reports no change in the level of software piracy in the Costa Rica market.

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

**Internet piracy:** Internet piracy, as everywhere else in the region, is a growing problem in Costa Rica. The most popular form of digital piracy takes place over peer-to-peer (P2P) networks such as the ARES network. Other sources of infringing files online include 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.

Currently there are no discussions between the content community and ISPs regarding Internet piracy on their networks. Internet piracy is a growing problem that is completely ignored by authorities and ISPs in the country.

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

Given the challenging financial times, there is a concern that more legitimate businesses may be tempted to use infringing software instead of purchasing legitimate product or licenses. Notably, Costa Rica produces and

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<sup>2</sup>BSA | The Software Alliance's 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Costa Rica was 58%, representing a commercial value of unlicensed software of US\$62 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA's 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

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

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

**Recent reservations to two treaties and pending legislation affecting the recording industry:** The main source of concern for the music industry in Costa Rica is an Executive Decree, No. 36,014-MP-COMEX-J published in the official Gazette in 2010, that implements reservations to the two international treaties protecting neighboring rights (Article 12 of the Rome Convention and Article 15.1 of the WIPO Performances and Phonograms Treaty (WPPT)). Those reservations effectively exempt broadcasters from performance rights payments to performing artists and record producers. The Decree has the odd distinction of implementing legislation that was introduced in 2009 but was never adopted; Bill No. 17,719 is still pending at the Legislative Assembly with no progress at all. The term in which the draft must be voted will expire in 2014, but the government could simply withdraw its support of the Bill to allow performance rights payments to performing artists and record producers to resume immediately. As it stands, these payments have been halted since the issuance of the Decree in 2010.

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

**CAFTA implementation:** Costa Rica has yet to fully implement its IPR obligations under the CAFTA-DR. In 2000, Costa Rica amended its 1982 Copyright Law to comply with certain obligations under the TRIPS Agreement and the WIPO Copyright Treaty and WPPT (collectively, the WIPO Internet treaties). 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 free trade agreement obligations still need to be addressed.

**Internet piracy measures:** Rights holders continue to face significant impediments in their efforts to address Internet piracy in Costa Rica due to the lack of an effective legal framework for the removal of infringing content. In 2011, Costa Rica implemented CAFTA-DR provisions establishing limited liability of 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 rights holders, and in practical terms creates a serious obstacle for the enforcement of rights in the digital environment. As an example, the decree allows an ISP up to 45 days just to forward a single notification to its subscriber. In the modern market 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-DR obligation that was due upon the agreement's entry into force. The Costa Rican government commenced efforts on this issue in 2002 with a Government Software Legalization Decree. The only government agency to demonstrate progress in implementing the Decree has been the National Registry, whose Copyright Office has been receiving data for several years from other government agencies about their software inventories, and which in general has complied with its software licenses. The Government of Costa Rica could improve the overall rate of software legalization by requiring private contractors to submit proof of their software license compliance, a step that could achieve noticeable results without legislative hurdles.

**The Law on Enforcement (*Ley de Observancia*):** With amendments to the *Ley de Procedimientos de Observancia de los Derechos de Propiedad Intelectual* (Law No. 8656 of 11 August 2008 amending Law No. 8039 of 12 October 2000) that went into force in 2010 and 2011, Costa Rica's Law on Enforcement provides for a number of matters that were needed for CAFTA-DR 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; provisions for injunctive relief, destruction of infringing materials and equipment, and border measures; and criminal remedies for violations of neighboring rights.

Other key elements of enforcement under the *Ley de Observancia* have fallen short of deterring criminal copyright infringement in Costa Rica. The jail terms for criminal copyright piracy are currently so low (in some cases as little as two months) as to pose negligible deterrence against infringement. It has become common practice for judges to use the discretion to choose fines rather than jail terms. Where low sentences are imposed, judges commonly use their discretion under the law to suspend them. Deterrent-level sentences at a minimum of three years should be imposed in practice, making the proposed amendments in 2012 to eliminate many of the law's criminal sanctions for copyright infringement, though failed, a step in the wrong direction. Meanwhile, fines are not consistently imposed under the *Ley de Observancia*, whose Article 55 includes a complicated four-step provision, linking the amount of the damages to the level of penalty; however, nowhere does the law explain how judges will calculate damages in piracy cases.

Apart from the lack of political will by prosecutors, several legal deficiencies have contributed to the problems with poor copyright enforcement in Costa Rica through 2011. Additional issues not addressed in the CAFTA-DR 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*"), including full *ex officio* authority in copyright cases. Otherwise, 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**

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

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. In practice, the Committee has met rarely since its creation, and nothing has come from those meetings.

In 2011, new Attorney General 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. While in late 2011 IIPA's members reported that local prosecutors were conducting investigations of copyright infringements, rather than dropping the cases as they have in the past, we are not aware of further progress or significant results in 2012. 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. The Government has taken no other steps to improve the overall enforcement of IPR.

**Police cooperation is positive but needs more resources:** The police efforts that take place in municipalities to raid and confiscate pirate optical disks from street vendors do not go so far as to investigate the supply chain of the pirated and counterfeit merchandise, or to initiate prosecution, and historically have taken place only in response to requests from rights holders rather than at a systemic level. The existing law does not permit *ex officio* actions for intellectual property infringement, with the exception of counterfeits that affect the public health.

**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.

**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. While there were reports in early 2012 that such an Office would begin to work in an official capacity that year, there has since been no public launch of a specialized division. The industries hope that the Attorney General, Jorge Echavarría, 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, and would benefit greatly from training.

# INDIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that India remain on the Priority Watch List in 2013.<sup>1</sup>

**Executive Summary:** India can be one of the world's leading legitimate markets for the creative industries – both foreign and domestic. The country continues to produce the greatest number of films in the world (estimated at nearly 1,000 full-length feature films per year), boasts a creative and diverse music market, a prolific publishing industry (19,000 publishers producing 90,000 titles per year), and a vibrant software market.<sup>2</sup> Other key economic studies (including by international organizations like UNCTAD and the Motion Picture Distributors Association) indicate that growth will continue. Unfortunately, content theft negatively impacts the profitability of creators, as a recent study highlighting the film industry<sup>3</sup> and piracy's effects the livelihoods of the professionals and workers involved demonstrates.<sup>4</sup>

Physical, online, and mobile piracy (through both mobile uploading/downloading, as well as mobile applications being used to infringe), illegal camcording of movies from cinema screens, the unlicensed use of software by enterprises, print and photocopy piracy, circumvention of technological protection measures (TPMs), e.g., through the use of mod chips and game copiers, and pay-TV theft stifle the market for other creative sectors and keep India's creative economy from reaching its full potential. Market access barriers in India further stifle the film, software, and entertainment software industries' businesses in India, fueling piracy. Some effective approaches to physical piracy (such as the implementation of the Goondas Act in many of the states, though to be a truly comprehensive framework it should include piracy of books and software within its scope) and online piracy (mainly through the IT Act and ancillary regulations) have been taken in recent years, but these steps have not been enough to stem the tide of piracy.

The Copyright Law as amended in 2012 leaves some remaining issues, but it is hoped the new law along with the IT Act and ancillary regulations (in particular, the Information Technology (Intermediaries guidelines) Rules, 2011) will result in strengthened law enforcement and judicial enforcement in dealing with all forms of piracy. A National IPR Strategy is under development, offering a forum to make needed changes that can achieve results in line with Prime Minister Manmohan Singh's call for India to experience a "decade of innovation."

### PRIORITY ACTIONS REQUESTED IN 2013

#### Enforcement

- Implement a national anti-piracy task force to reduce piracy, *inter alia*, by working with state Nodal officers,<sup>5</sup> providing them with significantly increased resources; provide more accountability and power to the recently constituted task force by FICCI under the aegis of the Ministry of Human Resource Development (MHRD). Our understanding is that the Task Force is now preparing recommendations to present to MHRD.

<sup>1</sup>For more details on India's Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2013SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

<sup>2</sup>For example, NASSCOM estimates that software and services revenues (excluding hardware) is expected to reach \$87 billion in fiscal year 2012, a 14.9% increase over 2011. Another recent industry report pegged the Indian film and television industry's total gross output at US\$20.4 billion, higher than the advertising industry. PricewaterhouseCoopers, *Economic Contribution of the Indian Film and Television Industry*, March 2010. Employment generated by this industry is estimated at 1.83 million workers, most of whom are daily wage earners.

<sup>3</sup>A report issued by KPMG in March 2012 indicated India's film industry grew by 11.5% in 2011, to US\$1.85 billion (Rs93 billion). Liz Shackleton, *India's Film Industry Revenues Up 11% in 2011*, Screen Daily, March 13, 2012, at <http://www.screendaily.com/news/asia-pacific/indias-film-industry-revenues-up-11-in-2011/5039184.article>.

<sup>4</sup>A separate Ernst and Young study concluded that the Indian Film Industry lost US\$959 million and 571,896 jobs due to film piracy in 2008.

<sup>5</sup>Nodal officers in the Indian State enforcement system are designated contact individuals relevant to intake and response.



- Reinvigorate “IP cells” within the state police, provide them with significantly increased resources, and establish specialized IP prosecutors, to be more effective in addressing piracy, including Internet/mobile device piracy.
- Encourage judicial reform, including establishing IP courts or panels with expert judges and prosecutors, which will help in accelerating the adjudication process in criminal and civil cases, and imposing deterrent fines and imprisonment, and civil remedies, including statutory damages.
- Develop a national-level database to track IP criminal cases.
- Increase the number of *suo moto* raids, including against corporate end-user software piracy, and empower government tax inspectors, including external and internal auditors, to check and account for genuine software licenses inside organizations, whether public or private.
- Mandate management officials of companies to account for and declare genuine software licenses in their books of accounts and financial statements, including by providing a regulation under the existing Companies Act.
- Promote and require the use of legitimate (original) books and scholarly journals at educational institutions.
- Empower customs to effectuate *ex officio* seizures, followed by destruction, of pirate goods.
- Ensure Anton Pillar orders are readily available in infringement cases to allow for preservation of evidence, and thereby minimize harm caused by defendant’s delay of proceedings as evidence can be preserved by court appointed commissioners.
- Issue a directive or strict policy guidelines mandating all government departments across the country use legal software and follow due diligence while procuring software assets.

### Legislation

- Continue to pursue effective remedies through the IT Act and ancillary regulations (including the Information Technology (Intermediaries guidelines) Rules, 2011), to ensure fair and effective measures to address repeat infringers, and include effective mechanisms to disable infringing content on domestic and foreign websites.
- Adopt legislation making it an offense to use (or attempt to use) an audiovisual recording device in a movie theater to make or transmit a copy of an audiovisual work, in whole or in part.
- Establish enhanced penalties for “pre-release” piracy, with provisions comparable to those adopted in the U.S.
- Adopt statutory damages in civil cases and allow restitution to be awarded in criminal cases.
- Provide that *ex parte* search and seizure orders should be granted to copyright owners as a matter of right in civil cases.
- Amend Indian tax laws to classify software piracy as a form of tax evasion and define corresponding tax violation rules in line with international best practices.
- Regulate production of optical discs including a licensing requirement, among other provisions.
- Amend state anti-piracy statutes laws (Goondas Acts) to include software and book piracy in addition to other forms of piracy.
- Provide tax benefits for associations involved in anti-piracy actions and capacity building.

### Market Access

- Eliminate significant market access barriers imposed on the motion picture industry including:
  - Bans on exclusivity in the pay-TV sector and similar restrictions in the Direct-to-Home (DTH) market (the reception of satellite programs with a personal dish in an individual home).
  - Price controls on the pay-TV sector.
  - Foreign ownership restrictions.
  - Inordinately high and discriminatory entertainment taxes on theatrical admissions, including unconstitutional taxes based on the language of the film.
  - Price fixing on tickets in South India as well as quotas on the number of screenings per title per day.
  - Onerous regulations on uplink and downlink of satellite signals beaming into India.
  - Disruptive content control rules for television.
- Eliminate high tariffs on entertainment software products.
- Eliminate double taxation of software.

- Refrain from imposing technology or procurement preferences or mandates for products using technology or IP owned and developed in India.

## **PIRACY UPDATES IN INDIA**

Online and mobile device piracy have become serious problems in India as Internet and broadband penetration have widened. The ubiquitous use of mobile devices and the rapid expansion of mobile and console-based game playing have led to new opportunities for right holders but unfortunately also to new challenges, as evidenced by the spread of mobile device piracy and modification chips for circumventing TPMs used to protect console-based games. Losses are very difficult to calculate for most industries, but for example, the music industry estimates a total loss of \$431 million in 2012 (the largest percentage of that attributable to mobile device piracy, then physical piracy, Internet piracy, public performance piracy, and radio/TV broadcast piracy) and upwards of 90% music piracy online,<sup>6</sup> while the software industry reported a 63% rate of PC software piracy in 2011 with a commercial value of unlicensed software estimated to be over US\$2.9 billion. The motion picture industry continues to be hammered by a devastating combination of illegal camcording, Internet, and hard goods piracy, notwithstanding the launch of some legal services for audiovisual materials.<sup>7</sup>

**Internet and Mobile Piracy Devastating Creative Industries in India:** With the growth of Internet connectivity, and increasing mobile penetration, Internet and mobile device piracy have grown worse in 2012 for the copyright industries in India. Internet & Mobile Association of India (IAMAI) reports 150 million Internet users in India as of December 2012,<sup>8</sup> with 12.8 million fixed broadband connections,<sup>9</sup> and 78.7 million mobile Internet users as of October 2012.<sup>10</sup> Illegal downloading sites, P2P filesharing, BitTorrent trackers and indexes,<sup>11</sup> streaming sites, deep linking sites, blogs, forums, and social network sites directing users to infringing files, cyberlockers used to advertise massive amounts of infringing materials, and piracy through auction sites all continue to plague right holders in India. A study undertaken by MPDA has India among the top ten countries in the world for Internet piracy, as pirated films out of India appear on the Internet in an average of 3.15 days.<sup>12</sup> During 2011, Peer Media Technologies reported that users initiated over 25 million downloads/uploads of unauthorized copies of major U.S. movie titles via certain P2P protocols in India. There is no indication that this situation improved in 2012.<sup>13</sup> In 2012, the Entertainment Software

<sup>6</sup>The music piracy rate remains extremely high notwithstanding the recent launch of many legitimate services, including Saregama, Nokia Music, Flipkart, Cyworld, 7digital, Gaana, In, Indiaone, Meridhun, My Band, Raaga, Radio One, Saavn, Dhingana, Artist Aloud, Telugu One, and Smashits.

<sup>7</sup>Legitimate entertainment content is available through legitimate retail chains such as Landmark, Planet M, and Ezone. Online retailers such as Ebay.com and Flipkart.com also sell legitimate DVDs. There are more legitimate avenues available in India to watch movies and TV shows online than ever before. In India, iTunes, Movieflix.com, Rajshri.com, Eros Digital, BigFlix.com, Hungama.com, Indya.com, Bollywoodmoviemax.in and Myplex.com have all emerged as legitimate platforms to access legitimate entertainment content.

<sup>8</sup>Internet and Mobile Association of India, Vernacular Report 2012, January 9, 2013, at [http://www.iamai.in/rsh\\_pay.aspx?rid=avDLOK1zAl8=](http://www.iamai.in/rsh_pay.aspx?rid=avDLOK1zAl8=).

<sup>9</sup> International Telecommunication Union, *Fixed Broadband Subscriptions 2000-2011*, at <http://www.itu.int/ITU-D/ict/statistics/material/excel/Fixed%20broadband%202000-2011.xls>, accessed on January 10, 2013.

<sup>10</sup>Internet and Mobile Association of India, *Mobile Internet in India December 2012*, January 2, 2013, at [http://www.iamai.in/rsh\\_pay.aspx?rid=Yh0mbvBD9VI=](http://www.iamai.in/rsh_pay.aspx?rid=Yh0mbvBD9VI=).

<sup>11</sup>For example, the International Intellectual Property Alliance (IIPA) listed Canada-based *Torrentz.eu* as a notorious market in its 2012 submission to the U.S. Trade Representative in its Special 301 out-of-cycle review to identify notorious piracy markets. *Torrentz.eu* is ranked the 121st most popular site in the world, according to Alexa.com traffic rankings. The site is particularly highly ranked in the city of Calcutta (12th) and in all of India it is ranked as the 18th most visited site (it is ranked in the top 32 sites throughout South Asia). See International Intellectual Property Alliance (IIPA), *Submission Re: IIPA Written Submission Re: 2012 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 77 Fed. Reg. 48583 (August 14, 2012), Docket No. USTR-2011-0011, September 14, 2012, at [http://www.iipa.com/pdf/2012\\_Sep14\\_Notorious\\_Markets.pdf](http://www.iipa.com/pdf/2012_Sep14_Notorious_Markets.pdf). IIPA also listed Ukraine-based *ExtraTorrent.com* (which claims it is "The World's Largest BitTorrent System") as a notorious market. That site claims, "Any torrents for FREE download. Download music, movies, games, software, iPod, anime, porn, adult, books, pictures and other torrents," and is particularly popular in South Asia, coming in, for example, as the 88th most visited site in all of India, according to Alexa.com. The Recording Industry Association of America cited in its notorious markets filing *exmasters.com* which it describes as "a web hosting company and is one of the biggest providers of services to BitTorrent trackers/indexing sites." While the site's servers are located in the Czech Republic, they have administrative control of more than 150 foreign websites whose primary function is to facilitate the download of illegal content, and the domain names for these websites are registered in India as well as Pakistan and elsewhere in Asia evidencing their global reach. See *RIAA Notorious Markets Submission*, *supra* note Error! Bookmark not defined.

<sup>12</sup>See PricewaterhouseCoopers Report, *supra* note 2.

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

Association reports that India placed sixth in the world in terms of the number of connections by peers participating in the unauthorized file sharing of select ESA member titles on public P2P networks, up from seventh in 2011.<sup>14</sup>

The music industry reports a significant increase in 2012 of mobile chip piracy, in which retail establishments sell or offer for free flash cards or other storage devices (or chips) for mobile phones preloaded with music to customers (sourced either from pirate or legitimate CDs or downloaded from pirate websites or through P2P filesharing services).<sup>15</sup> In addition, there are numerous “apps” for mobile phones, for example, operating on iOS and Android phones, used to make available Indian and international music to mobile subscribers without authorization. For the software industry, Internet piracy takes the form of auction sites and sites offering unauthorized copies of software for download. For the motion picture industry, camcordered versions of a film hit the Internet on infringing websites through release groups within a few hours of a film’s release. The illegal online copy may be used further to produce hard goods for sale in key markets across India. The top ten illegal websites in India for piracy of motion pictures are: *Tamilwire.com*, *moviemobile.net*, *bharatmovies.com*, *tamilthunder.com*, *tamilcreation.com*, *bwtorrents.com*, *torrents.in*, *extratorrent.com*, *filestube.com*, *hindi5.com*, *movi91.com*, *fullmovies.com*, *moviespack.com*, *kat.ph*, *desitorrents.com*, *tamiltorrents.net*, *doregama.in* and *dctorrents.com*. These sites cater to the demand for local language dubs of U.S. films as well as Indian films. Many of the illegal websites and other services affecting India operate from foreign servers including Ukraine, Canada, Russia, Pakistan, South Africa, Afghanistan, and the United States.

**Camcording Piracy Has Grown Out of Control in India:** Illegal camcords from India have been globally redistributed through release groups at least 32 times in 2012, and paired with audio tracks globally in 12 different languages.<sup>16</sup> There was a significant rise in the number of camcording incidents in India in 2012 (67), with India accounting for 53% of all forensic matches in the Asia Pacific region in 2012. Increased camcording incidents were observed from Ahmedabad (Gujarat), Indore (Madhya Pradesh), and Ghaziabad.

**Retail Piracy and Circumvention of TPMs Continue to Harm Right Holders:**<sup>17</sup> The predominant form of retail piracy in India consists of burned optical discs,<sup>18</sup> with content including music compilations in MP3 formats, pre-release music (primarily Indian titles and some international repertoire), motion pictures on VCDs, DVDs, and CD-Rs (most of which are available in major cities well before the local theatrical release of the title), and CD-ROMs and DVDs of software, entertainment software and books/reference materials. Some imported discs and factory-produced discs from India have reportedly still been detected in recent years.<sup>19</sup> Publishers continue to report cases where many best-selling medical and technical textbooks are being loaded onto CD-ROMs and being sold for US\$5 or less. The pirate assembly of PCs (so-called hard disk loading piracy) is also prevalent in India.<sup>20</sup> There is almost no legitimate rental video market in India, since cottage pirate rental video stores dominate the market. Movie piracy

<sup>14</sup>ESA’s reporting on P2P activity does not take into account downloads of these titles that occur directly from hosted content, such as games found on “cyberlockers” or “one-click” hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

<sup>15</sup>The local music industry association has launched MMX to license mobile chip practices with respect to music and has thereby been able to turn a loss into a relative gain. Nonetheless, illegitimate mobile piracy dwarfs such efforts to date. See <http://www.mmxindia.org/>.

<sup>16</sup>The motion picture industry identified 33 forensic matches of its members’ films in 2011 and 23 in 2009.

<sup>17</sup>The music industry alone reports losses due to hard goods piracy of Rs300 crores (US\$55.8 million).

<sup>18</sup> *Accused Arrested in Mapusa Pirated CDs Case Out on Bail*, The Times of India – Goa, December 22, 2011, at [http://articles.timesofindia.indiatimes.com/2011-12-22/goa/30546598\\_1\\_mapusa-police-cds-dysp-sammy-tavares](http://articles.timesofindia.indiatimes.com/2011-12-22/goa/30546598_1_mapusa-police-cds-dysp-sammy-tavares) (in which the shop “Suresh Music” at the Mapusa municipal market was raided, resulting in seizure of around 5,000 pirated CDs and a CD writer; the complaint was laid by famous *tiatr* artist Francis de Tuem, after finding a pirated CD of his latest *tiatr* titled *Illegal*, with the Mapusa police. See also *Pirated CDs Seized from House in Beemapally*, January 29, 2012, BuzzExpress, at <http://expressbuzz.com/cities/thiruvananthapuram/pirated-cds-seized-from-house-in-beemapally/358030.html> (reporting the seizure of massive numbers of DVD covers and hundreds of DVD-Rs burned with content, mostly pornographic, as well as burners; the accused was apparently able to produce 60 discs in a period of three seconds, which translates to many thousands of discs per hour).

<sup>19</sup>There reportedly remain dozens of optical disc factories in India which have a capacity to produce millions of discs per year. To ensure all factories reproduce only legitimate discs, in recent years, industry presented draft optical disc legislation which would regulate the plants’ activities, but a major company in India, Moser Baer, opposed the legislation and its inclusion of blank disc licensing. The music industry reported three factory cases brought which were settled through plea bargaining.

<sup>20</sup>Calicut (Kerala), Belgaum (Karnataka), Gulbarga (Karnataka), Nagpur (Dhantoli), Tilak Road (Pune), Canada Corner (Nasik), Golani Market (Jalgaon), Nehru Place (Delhi), Naza Market (Lucknow), Agra, Ludhina Market (Ludhiana) contain a tremendous number of computer resellers, retailers and assemblers selling tens of thousands of computers pre-loaded with pirated operating system software. It has been estimated that between 70-90% of all computers sold in these markets have infringing software on their hard drives.

hard goods remained available for open sale through street vendors who were most prominent in metropolitan areas like Mumbai, Delhi, Chennai, Kolkatta, and Ahmedabad. The high rate of piracy of entertainment software in India is made possible by the widespread availability of circumvention devices used to bypass TPMs, with vendors openly selling circumvention devices on the Internet, in retail stores and kiosks, or selling game consoles that are already modified. Both USTR and IIPA members have noted various physical marketplaces in India as “notorious” for the availability of pirated/illegal materials.<sup>21</sup>

**Signal Theft and Public Performance Piracy:** Pay-TV piracy is another problem which plagues the content industries. Unlicensed films/titles are aired by local cable operators. At times even new releases are broadcast over cable networks. In the past, cable operators in India routinely “under declared” the number of subscriptions for which they were being paid, so they paid right holders in movies and television content substantially less than they were rightfully owed. Given the size of the Indian market, the losses to the industry from such levels of underdeclaration were huge. Cable TV digitization, which has by now been implemented in the four primary metropolitan areas in India (and second and third tier metro areas now set to roll out as well) is expected to reduce the incidence of under-declaration. Up to the present, these practices resulted in substantial losses in tax revenue to the Indian states, and several of the states have begun complaining loudly about losses. Public performance piracy (e.g., in hotels, bars, restaurants, retail establishments) is also widespread for the music and sound recording industry.

**Software Piracy:** The software industry reports that the rate of software piracy has continued to decline in India, though it remains high at a rate of 63% in 2011 (down from 69% in 2007), representing a commercial value of unlicensed software of almost US\$3 billion.<sup>22</sup> A key part of this problem remains the unlicensed use of software by enterprises in India. There have also been decreases in hard disk loading (the consumption of “white boxes” or assembled hardware with unlicensed software), although this remains a problem in some states. Moreover, companies appear to be gradually more concerned and diligent about ensuring that they use licensed software programs. A 2010 study conducted by IDC and sponsored by BSA, entitled *Piracy Impact Study: Economic Benefits of Reducing Software Piracy*, found that decreasing India’s PC software piracy rate by ten points over four years would deliver US\$4.7 billion in GDP, \$512 million in tax revenues and nearly 60,000 new IT jobs. The benefits would be even greater if the ten point reduction was achieved in two years, yielding \$6.1 billion in GDP and \$676 million in tax revenues.

Notably, in November 2011, BSA launched in India a new global program for certifying enterprises that meet International Organization for Standardization (ISO) standards for software asset management (SAM) – the “Certified in Standards-based SAM for Organizations (CSS(O))” program. Several Indian enterprises have completed or are in the process of obtaining this certification, which will recognize them as implementing SAM best practices. Also in November 2011, BSA and the Department of IT issued a joint report establishing a roadmap for promotion of SAM

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<sup>21</sup>In its December 2012 announcement, USTR cited Nehru Place (New Delhi, India) as “one of the many markets in major cities throughout India that are known for dealing in large volumes of pirated software, pirated optical media containing movies and music, and counterfeit goods.” See United States Trade Representative, *Out-of-Cycle Review of Notorious Markets*, December 13, 2012, at <http://www.ustr.gov/sites/default/files/121312%20Notorious%20Markets%20List.pdf>. The Motion Picture Association of America (MPAA) recently identified in its Special 301 out-of-cycle review submission on “notorious markets” for piracy. Specifically cited were Richie Street and Burma Bazaar (Chennai); Bada Bazaar (Kolkata); Palika Bazaar (underground market in Delhi); Manish Market, Lamington Road, Fort, Andheri Train Station, Thane Train Station, Borivli Train Station, and Dadar Train Station (Mumbai). These Indian markets with clusters of street vendors attract significant pedestrian traffic and are known for their high volume of pirated DVDs and other counterfeit products. See Michael O’Leary, Motion Picture Association of America, *Request for Public Comment on the 2012 Special 301 Out of Cycle Review of Notorious Markets*, Docket No. USTR-2012-0011, September 14, 2012.

<sup>22</sup>BSA | The Software Alliance’s 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in India was 63%, representing a commercial value of unlicensed software of over US\$2.9 billion. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

best practices in government and private enterprises and collaborative efforts between government and industry continue under this framework. Both of these efforts offer promising opportunities to drive down unlicensed software uses by enterprises.

**Pirate Printing and Photocopying of Books and Journals:** Piracy of trade books, textbooks, professional books (scientific, technical, and medical), and scholarly journals continues to harm the publishing industry in India. Book piracy occurs in a variety of ways in the country. While online piracy of trade books, textbooks, journals and reference books is beginning to rise, publishers' main problem in India remains hard goods piracy. Unauthorized photocopying as well as the compilation and sale of "course packs" are commonly seen in relation to textbooks used in educational institutes. Print piracy (off printing presses or reprints) affects academic titles as well as trade titles. Unauthorized and scanned copies of books (particularly in the scientific, technical and medical sectors) and the hosting of such copies on websites created and maintained by university students are also on the rise in India. Photocopying remains a severe problem for the academic and professional sectors of the industry, and continues on and around university campuses and in libraries, sometimes even condoned by the institutions. Wholesale copying of entire books is increasingly complemented or replaced by use of unauthorized compilations in the form of course packs, or "self instructional material" (SIM). These are used both for classroom teaching and distance learning, with the materials for the latter sometimes found in electronic form. Industry continues to wait, apparently in vain, for the MHRD to issue a long-promised government order/circular to all educational and research institutions to combat illegal photocopying on university campuses.

Another persistent problem continues to be the export of India-only, lower-priced editions of books intended only for distribution in the Indian market. Such India-only copies are being exported to countries in Africa, the U.S., the United Kingdom, and other European markets. The lower-priced edition program was intended to benefit and meet the specific needs of the Indian market, but unfortunately, the export of such editions out of India is now adversely affecting more developed markets. In 2012, the publishing industry conducted a global investigation into the export of India-only editions. The investigation identified a known distributor which has since agreed to cease engaging in the infringing activity.

## **ENFORCEMENT UPDATES IN INDIA**

**Internet Enforcement Experiences Mixed in India:** The Internet enforcement situation in India demonstrates the complex nature of fighting piracy in India. The Copyright Law (both before and after the 2012 amendments) fails to provide a wholly adequate framework for a systematic and effective approach to Internet piracy.<sup>23</sup> As such, takedowns have been generally patchy and never entirely successful. The music industry reports a takedown rate in India of 30% to 40%, with better luck against established user generated content (UGC) sites with established takedown processes,<sup>24</sup> but only some relief in the case of court-mandated takedowns due to claimants' efforts to serve orders on ISPs, who comply for a short period of time after which compliance is an issue. One of the largest problems in India remains rogue foreign sites operating within the country, despite criminal cases having been filed against many of these sites. With ISPs taking the position that they will only take instructions from the Department of Telecommunications, and with no MOU in place with ISPs, there is no real remedy except for seeking to disable access to such foreign rogue sites.

It is against this backdrop that local right holders have requested courts to order the disabling of access to foreign rogue sites causing significant harm to their interests.<sup>25</sup> The latest instance involves the local music industry

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<sup>23</sup>The Copyright (Amendment) Act, 2012 now incorporates specific ISP safe harbor provisions requiring right owners to issue takedown notices, to which ISPs are required to remove identified content for a period of 21 days. Failure of the right owner to furnish a court order within a period of 21 days from issuance of takedown notice will allow the ISP to reinstate the content. This can only be a part – and a small one at that – of an adequate approach to online piracy.

<sup>24</sup>Difficulties in enforcing against Internet-based piracy in India are compounded by the difficulties right holders have finding correct IP addresses and the inability to locate pirate operating websites.

<sup>25</sup>In 2011, industry used John Doe orders (known locally as "Ashok Kumar" orders and commonly used in India to target individual sellers and cable TV operators) to have ISPs disable access to infringing materials. In July 2011, a local Indian film studio (Reliance) in the process of releasing a major Indian film (...continued)

association obtaining orders from the Calcutta High Court directing all ISPs (387 in all) to disable access to 104 music sites from India (this included *songs.pk* mentioned in the 2011 IIPA report as particularly egregious, but many others with clear linkages to Bollywood, music or movies of India, or other indicia such as inclusion of words like “desi” or “tamil”).<sup>26</sup>

Where investigations reveal that websites have a nexus to or contact details in India, the music industry is bringing criminal complaints. Twenty-two such criminal complaints were lodged in 2012 by the music industry. One of these criminal cases was lodged in Rajkot Gujrat involving two websites (both shut down) and resulted in the arrest of two students in connection with running the websites; the case is ongoing. With respect to growing mobile device piracy, the Indian music industry is bringing to the police more than 500 mobile device piracy cases per month (up from 200 per month in 2011). However, cases such as these are not high on the agenda of Indian police, since they are instead focused principally on Internet or mobile cases involving credit card fraud or false names and addresses. One court case may also be helpful in defining the contours of liability for intermediaries in the online space and fostering greater cooperation among ISPs and other intermediaries. In *Super Cassettes Industries Ltd. v. Myspace Inc. & Another*,<sup>27</sup> decided in July 2011, the plaintiff was granted an interim injunction against the defendant whose social network was found to be secondarily infringing through allowing its “webspace” or “place” to be used for sharing infringing materials. The local Indian record industry was involved in this legal action, as well as other complaints filed with the Mumbai Cyber Cell against 23 other websites (many of which have been shut down as a result of the actions in Calcutta).

**Camcording and the Nexus to Internet and Hard-Goods Piracy:** For the motion picture industry, the strong nexus between illegal camcording in India, a problem which is growing out of control, and Internet piracy and even hard goods piracy involving motion pictures, requires a multi-faceted approach. Several actions were taken in 2012 against syndicates engaged in the illegal camcording of films and the release of those films on websites or on hard goods. For example, joint efforts between the MPA’s representative office in India, the Motion Picture Distributors Association (India) Pvt Ltd., and the Andhra Pradesh Film Chamber of Commerce (APFCC), resulted in arrests of four members of two major syndicates in southern India specializing in illegal camcording as well as online and hard goods piracy. The arrested operated out of Bangalore, Hyderabad, and Vijayawada and had links with syndicates in Delhi. The arrests led to the taking down of *spicyden.com*, *tollyzone.com*, and *desibuffer.com*. In another case during the fall of 2012, the arrests of three individuals distributing illegal copies of films online led to the takedown of *team-cc.com*, *rockerzone.com*, *southreels.com*, *southdownloads.com*, and *southcreations.com*. This latter operation was primarily initiated by the APFCC.<sup>28</sup> Industry reports some awareness activities on “source” piracy have been helpful, and that cinema owners are showing slides in cinema halls and placing messages on tickets conveying that illegal camcording is not allowed. Industry has also launched the “Make a Difference” campaign working directly with cinema owners, whose interest should include clamping down on illegal camcording.

**Some Retail Enforcement Ensues, But Piracy Remains a Low Priority Offense:** Some industries continued to experience good support from Indian authorities in 2012, with law enforcement generally willing to conduct complaint-based raids and, e.g., running *suo moto* raids for the music industry. The music industry reported

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(...continued)

(*Singham*) in the market, and following up on a similar request by another film studio (having released another major Indian motion picture earlier in the year), obtained an “Ashok Kumar” Order, allowing it to send cease and desist notices to disable access to its new film which was to be released two days later. Similar enforcement was undertaken in August for the film *Bodyguard* and in December for *Don 2*. Shortly thereafter the ISPs started some limited disabling of access to various notorious sites including *Megaupload.com*, *Mediafire.com*, and *Megavideo.com*. Other successful industry actions included one initiated in 2010 by Alliance Against Copyright Theft (AACT) (MPA allied with the local Hindi film industry). In July 2011, the Mumbai Cyber Police arrested two suspected operators of the site *moviemax.in* in Gujarat, which was one of five locally based sites (among 99 notified to police), and the police were helpful in ensuring those sites could be taken down as well, although industry has no confirmation as to the current status of the other four sites.

<sup>26</sup>The local music industry group adopted the strategy of highlighting that the infringing sites were operating without a copyright license, so even though the sites were outside India, the ISPs were deemed inside India and governed by Indian law, since revenues from users came from India.

<sup>27</sup>*Super Cassettes Industries Ltd. v. Myspace Inc. & Another* (High Court of Delhi, July 29, 2011, IA No.15781/2008 & IA No. 3085/2009 in CS (OS) No. 2682/2008).

<sup>28</sup>These actions follow others in 2011. For example, in 2011, there were two interdictions and two arrests of individuals illegally recording films in Indian cinemas. In November 2011, the police in Thane arrested an individual camcording *The Adventures of Tin Tin* on the opening day of its theatrical release in India.

more than 2,260 raids during 2012 (up from 1,400 in 2011), many of which were run *suo moto*, while the number of piracy cases remaining in litigation stands at an estimated 18,000. Publishers, on the other hand, note that police rarely ever initiate *suo moto* raids to address book piracy, usually only taking action after receiving a right holder's formal complaint under Section 200 of the Code of Criminal Procedure. The motion picture industry notes a couple of raids in 2012 conducted in Nasik, involving illegal DVD manufacturing and retail stores where more than 10,000 DVDs were seized and two people were arrested. The second raid was conducted in a warehouse, and led to the seizure of 5,535 DVDs and one person being arrested. Major hurdles remain, given the lack of anti-piracy teams among the Indian government other than in Tamil Nadu and Kerala, the lack of dedicated prosecutors or police, and the fact that piracy continues to be in general a low-priority offense amongst enforcement authorities. Moreover, publishers report that there are often threats of violence against rights holder representatives engaged in anti-piracy activities.

**Enforcement Against Software End-User Piracy Improving:** Enforcement is improving against software enterprise end-user piracy due in large part to the impact of civil enforcement actions. Civil actions comprising injunctions and Anton Piller orders continue to have a significant impact. On the other hand software "channel piracy," i.e., the reproduction of infringing/counterfeit software on physical media remains largely the same in India. Criminal enforcement remains an ineffective means of combating end-user software piracy.

**Enforcement Through State Cells in India Should be Enhanced Further Through National Coordination:** The Indian government, in its 2010 Special 301 Submission, indicated, "[e]nforcement Cells have been set by the state governments in their respective police headquarters. Nodal officers have been appointed by the state governments to handle IPR related offences."<sup>29</sup> However, there remains no Federal government-led initiative to coordinate enforcement with and between the state governments. A national anti-piracy task force with goals to reduce piracy, *inter alia*, by working with state cells and Nodal officers should be established forthwith. The state cells, first established in 2002, are apparently starting to run more significant numbers of *suo moto* raids against piracy.<sup>30</sup> The industries all report good working relationships with the state cell in Delhi, while one or more industries reports good working relationships and effective assistance from Tamil Nadu, Kerala, Punjab, Mumbai, Bangalore, Chennai, and Hyderabad.<sup>31</sup> One issue that publishers have encountered, however, is that the jurisdiction of various teams are not clearly defined, leading to delays and confusion as to the most efficient approach for addressing instances of piracy. For example, in the Delhi Economic Offences Wing there are sections dealing with cyber crime and IPR. However, there are no clear guidelines about which section a right holder should approach.

**State Anti-Piracy Statutes:** Many states have enacted state anti-piracy laws (Goondas Acts) that recognize the link between piracy and organized crime. These statutes should cover all forms of piracy including software and books and journal piracy which are often not within the scope of these laws.

**Civil and Criminal Court Processes Remaining Somewhat Problematic:** Despite some positive case results in both civil and criminal cases in the past couple of years, industry notes some endemic problems. First, criminal fines (reportedly roughly 200 fines were meted out in copyright cases in 2012) are invariably low and non-deterrent, with most falling under US\$1,000. Second, while the number of criminal convictions has gone up in the

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<sup>29</sup> See Government of India, Ministry of Human Resource Development, Department of Higher Education, Copyright Office, *State-wise Nodal Officers for Enforcement of Copyright: List of the Nodal Officers nominated by States/UTs*, at <http://copyright.gov.in/frmStateWiseListNodalOfficers.aspx>. There was even an anti-piracy coordination cell launched in October 2010 by FICCI.

<sup>30</sup> A 2009 raid involved the largest ever seizure of pirated academic and scientific, technical and medical (STM) books in India. During the last quarter of 2009, a raid in Delhi against a printer, binder and distributor producing pirated academic and STM books revealed 80,000 prints and 124 negatives of a single publisher's titles on hand. This led to raids on two warehouses belonging to the distributor, leading to at least 160,000 more suspected pirated titles. The distributor/book seller appeared to be supplying pirated books to locations in Agra, Kanpur, Delhi, Gwalior, Bhopal, Indore, Kolkata, Cuttack, Bhubaneswar, Guwahati, Chennai, Hyderabad, Bangalore, Mumbai, Pune and Nagpur.

<sup>31</sup> The Mumbai police have both a copyright cell, dealing with OD and other piracy, and a cybercrime cell which deals with software piracy. *Mumbai Police: Organization and Functions*, at [http://www.mumbaipolice.org/%5Cspecial%5Corg\\_fun5.htm](http://www.mumbaipolice.org/%5Cspecial%5Corg_fun5.htm). See *Other States: Anti-piracy cell for Punjab*, February 27, 2009, at <http://www.thehindu.com/2009/02/27/stories/2009022752740300.htm>. See *Anti-Piracy Raids Seize Close to 15000 Pirated Discs Mumbai Police Along With AA Khan and Associates Conduct Raids Across the City*, *Thaindian News*, May 13, 2010, at [http://www.thaindian.com/newsportal/entertainment/anti-piracy-raids-seize-close-to-15000-pirated-discs-mumbai-police-along-with-aa-khan-andassociates-conduct-raids-across-the-city\\_100363186.html](http://www.thaindian.com/newsportal/entertainment/anti-piracy-raids-seize-close-to-15000-pirated-discs-mumbai-police-along-with-aa-khan-andassociates-conduct-raids-across-the-city_100363186.html).

past couple of years, the sheer number of piracy cases still pending indicates that much more needs to be done to effect judicial reform and speed dockets; the music industry reports roughly 18,000 pending cases. Third, many courts, particularly outside Delhi, remain of concern, due to the endemic delays in court proceedings, the lack of trained prosecutors, problems with retaining evidence, and failure to investigate up the chain. Further problems involve unreasonable demands on right holders to produce copyright registration certificates, and demands for right holders to physically make witnesses available.<sup>32</sup> Even in civil cases, in which credible IP judges have developed in the High Court in Delhi, Chennai and Kolkata, the high pendency rate, low damages, and the years that it takes to enforce any kind of court judgment, remain problematic features of the legal system in India. For these reasons, IIPA continues to urge the Indian government to establish special IP courts throughout the country with expert judges and prosecutors.

## **COPYRIGHT LAW AND RELATED ISSUES**

**Copyright (Amendment) Act, 2012 In Force, Further Modernizing India's Copyright Law:** Copyright protection in India is governed by the Copyright Act, 1957 as amended last by the Copyright (Amendment) Act, 2012, effective June 21, 2012, and related laws and regulations. The Act (as amended) contains some improvements over the previous (2010) draft,<sup>33</sup> and largely leaves in place the enforcement structure of the Copyright Act, 1957 (as last amended), and related laws and regulations.<sup>34</sup> Nonetheless, the Act also leaves in place existing, and raises some new, concerns which can be summarized as follows:

- unprecedented ownership and assignment provisions that could unduly restrict existing commercial arrangements in India;
- expanded compulsory license provisions;
- inadequate provisions on the protection of technological protection measures (TPMs) against unlawful circumvention as well as trafficking in circumvention devices and services; and inadequate protection of rights management information (RMI);

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<sup>32</sup>Right holders have noted that some police departments have now begun asking for the presence of company officials in order to commence a criminal action. However, some right holders have also noted that courts are allowing cross-examination by video-conferencing, and would encourage the expansion of this practice to all IP cases.

<sup>33</sup>Among improvements accomplished by the "Notice of Amendments" are the following: 1) it resolves satisfactorily a proposed change that would have damaged the Indian exhaustion (parallel imports) regime; and 2) it narrows the availability of a loophole to the prohibition on unauthorized rental to "a non-profit library or non-profit educational institution."

<sup>34</sup>According to the explanation of the Indian government in its 2010 Special 301 Submission, Chapter XIII of the Indian Copyright Act, 1957 provides for penalties for offences committed under the Copyright Act and empowers the police to take necessary action. These are the following:

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

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

- failure to address adequately online infringement/Internet piracy issues and to promote ISP responsibility and foster cooperation with right holders to combat such infringements; and
- some overly broad exceptions and limitations.

Additional issues of concern that were not addressed in the amendments include: 1) the lack of statutory damages; and 2) overbreadth of the statutory exemption for making copies of software in sections 52(1)(aa) and (ad) (there is no numerical limit on the number of copies).

In the fall of 2012, MHRD released the Draft Copyright Rules, 2012 (“Draft Rules”) for comment. IIPA provided comments to the Director & Registrar of Copyright on the Draft Rules. Herein below is a discussion of IIPA’s remaining concerns with the Act as amended, noting where the Draft Rules could be employed to address these concerns.

**Ownership Issues (Section 17), Assignment of Copyright (Sections 18 and 19):** Changes to the Indian Copyright Act restructure ownership and assignment issues, having the potential effect of undermining and upsetting longstanding commercial arrangements as to cinematographic works and sound recordings. First, under amended Section 17(e),<sup>35</sup> authors of “original literary, dramatic, musical and artistic works” incorporated into a cinematographic work are now deemed the original owners of copyright, and the default rules on works made “at the instance of any person” or on works for hire (employers) no longer apply to such works.<sup>36</sup> In effecting this change, the legislature has essentially overturned case law previously holding that the producer of a film is the first owner of copyright in the literary and musical works used in recorded songs which are synchronized for inclusion in a film, unless there is a contract to the contrary.<sup>37</sup> Note that this change also affects other works incorporated into a cinematographic work. The practical effects of this change are yet to be seen. It should be confirmed that this provision applies prospectively and not retroactively, and IIPA has requested confirmation of the prospective application of this provision (as well as Articles 18 and 19) in the Draft Rules.

The more far-reaching changes are effectuated in Section 18. Several recent Indian court decisions concluded that musical works included in audiovisual works or in sound recordings are not subject to payment of public performance royalties, i.e., the public performance rights in such musical works are deemed assigned to the producers of sound recordings or the audiovisual works in which they are used. These court decisions denied right holders in musical compositions the ability to enjoy their exclusive rights and run counter to India’s compliance with its international obligations under the Berne Convention and the TRIPS Agreement. The Act fixes the problems created by the court decisions in some respects but creates new problems in the process.

In Section 18(1), provisos indicate the author of a literary or musical work shall not be deemed to have assigned or waived “the right to receive royalties to be shared on an equal basis with the assignee of copyright” in two cases: 1) when included in a “cinematograph film” for all “utilization” other than “the communication to the public of the work along with the cinematograph film in a cinema hall”; and 2) when “included in the sound recording but not forming part of any cinematograph film.” New Sections 19(9) and (10) of the Act preserve the right of the author “to claim an equal share of royalties” as to: 1) “utilization” of “any work” in a cinematograph film in any form other than “for the communication to the public of the work, along with the cinematograph film in a cinema hall”; and 2) “utilization” of “any work” in “a sound recording which does not form part of any cinematograph film.”

<sup>35</sup>Section 17(e) provides, “Provided that in case of any work incorporated in a cinematograph work, nothing contained in clauses (b) and (c) shall affect the right of the author in the work referred to in clause (a) of sub-section (1) of section 13.”

<sup>36</sup>As to copyright in works incorporated into a cinematographic work, this remains covered by Section 13(4) which provides, “The copyright in a cinematograph film or a sound recording shall not affect the separate copyright in any work in respect of which or a substantial part of which, the film, or as the case may be, the sound recording is made.”

<sup>37</sup>See *Indian Performing Right Society v Eastern India Motion Picture Association*, AIR 1977 (2) SCC 820.

IIPA agrees that mere inclusion of works in an audiovisual work or sound recording should not deem assigned or waived the rights of the authors of those works, or deny them the ability to negotiate and receive payments for the utilization of those works, e.g., public performances of musical works, or the exercise of other exclusive rights. At the same time, the new provisions should not limit the ability of right holders to freely engage in contractual relationships with the authors of literary or musical works. IIPA is also concerned about the exact percentages or amounts ascribed to be paid to such authors, such as the Section 18 proviso that the royalties be shared with the assignee “on an equal basis,” or the Section 19 mandate of “an equal share.” This text does not specify the basis on which an “equal share” is calculated, although reports indicate this will result in a “net” 50/50 share between the publisher/owner and author following deductions of collecting societies’ costs. These provisions undermine the freedom of contract and the flexibility of parties to negotiate other agreements on royalties’ distribution which could be more beneficial or appropriate under the circumstances. It should be confirmed that the scope of application of this provision is specifically limited to works created after the effective date of the law and has requested confirmation of this in the Draft Rules. Otherwise, it would upset existing freely negotiated contractual relationships and hinder the ability of right holders in such films or sound recordings to distribute their works without fear of disputes over conflicts between such arrangements and the statutory mandates.

Other parts of the Act unfortunately provided for significant limitations on assignments of works. According to a Section 18 proviso, assignments are deemed invalid as to “any medium or mode of exploitation of the work which did not exist or was not in commercial use” at the time the assignment was made unless that medium or mode was “specifically” mentioned in the assignment. This change precludes “all rights” assignments which historically have been treated by both authors and publishers/producers as the norm in the business, and could wreak havoc with existing distribution arrangements, in particular with respect to digital distribution.<sup>38</sup> To the extent the provisions apply retroactively, they are also subject to possible constitutional challenge; IIPA has requested that in the Draft Rules it be confirmed that they do not apply retroactively. The software industry is also concerned about this provision, which severely limits the scope of a possible assignment of copyright in any work including software; given technological advances, it is not realistic to expect that the modes and media of exploitation can be fully spelled out in a contract as this provision would require.

Finally, IIPA has indicated to MHRD our operating assumption that the Act governs the relationship of the creative parties with respect to the production of works in India, and does not also convey an intention to interfere with the intention of contracting parties outside of India. IIPA has requested that the Draft Rules be modified to explicitly acknowledge that there is no intention for Articles 17 through 19 to affect the decisions of parties with respect to the creation of works outside of India, or their decisions about how to allocate revenue for the use of such non-Indian works in India.

**Extension to Foreign Works of, and Addition of New, Berne- and TRIPS-incompatible Compulsory Licenses:** The Act extends two existing compulsory licenses, which are currently applicable only to Indian-origin works, to include all foreign works. The extension of these compulsory licenses to foreign works appears to run counter to India’s Berne Convention and TRIPS obligations.<sup>39</sup> This is because the Berne/TRIPS framework permits compulsory licensing in only very limited and specific circumstances, including: 1) the recording of musical works under Article 13(1) of the Berne Convention;<sup>40</sup> and 2) the exclusive rights recognized under Article 11*bis*.<sup>41</sup> In

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<sup>38</sup>One industry group indicates that the “medium” and “mode” restrictions can be dealt with through careful drafting of assignments, e.g., through use of language such as “shall extend to and include, but are not limited to, the following modes and mediums of reproduction, performance, distribution and communication to the public of the works, which are in existence or which the parties anticipate may come into existence in future,” with a list of as many specific modes or mediums as possible. We remain skeptical that this can capture the limitation on coverage of modes or mediums that “did not exist or was not in commercial use” at the time of the assignment. It is also suggested that it may be possible, as a practical matter, to draft around this limitation by characterizing transactions as “exclusive licenses” rather than assignments, although it is uncertain whether courts would give any effect to such a characterization.

<sup>39</sup>In 2010, the Standing Committee was also concerned about the international implications of compulsory licenses and recommended they be reviewed.

<sup>40</sup>Article 13(1) of the Berne Convention provides,

Each country of the Union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, to authorize  
(...continued)

addition, the Berne Convention includes an Appendix containing compulsory licenses with respect to the translation and reproduction of works protected under the Convention that may be invoked under certain limited conditions by developing countries, notably for educational and developmental purposes. India has neither availed itself of the Berne Appendix, nor adhered to the stringent tests of the Berne Convention Appendix in crafting the new compulsory licenses.

- **Section 31:** The first, Section 31, involves a compulsory license to “republish,” “perform ... in public,” or “communicate ... to the public by broadcast” any work for which the right holder has “refused to republish or allow the republication of the work or has refused to allow the performance in public of the work, and by reason of such refusal the work is withheld from the public,” as well as any work for which the right holder “has refused to allow communication to the public by broadcast, of such work or in the case of a sound recording the work recorded in such sound recording, on terms which the complainant considers reasonable.”
- **Section 31A:** Section 31A, an “orphan works” provision, provides for a compulsory license to “publish” or publish a “translation thereof in any language” ... “unpublished Indian works” for which “the author is dead or unknown or cannot be traced, or the owner of the copyright in such work cannot be found.” The Act extends this compulsory license to all “unpublished or published works” that are being “withheld from the public.”
- **Section 31B:** Section 31B is included for the benefit of the disabled. Section 31B fails to contain necessary protections to ensure that such works are limited solely to the disabled and that they otherwise fully meet the Berne Convention three-step test, and the 2011 amendments extend the availability of the compulsory license to “[a]ny person working for the benefit of persons with disability on a profit basis or for business....”
- **Section 31D:** The broadcast compulsory license in Section 31D is unprecedented, covering both radio broadcasts and television broadcasts, and appears to be inconsistent with India’s Berne Convention and TRIPS obligations.<sup>42</sup> It is not limited on its face to those activities under Berne Article 11*bis* for which appropriate

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the sound recording of that musical work, together with such words, if any; but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

See discussion of the possibility of compulsory licensing under this provision in Sam Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, World Intellectual Property Organization Standing Committee on Copyright and Related Rights, Ninth Session (Geneva), June 23 to 27, 2003, SCCR/9/7, April 5, 2003, at 28-30.

<sup>41</sup>Article 11*bis*(2) of the Berne Convention provides,

It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

See discussion of the possibility of compulsory licensing under this provision in Sam Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, World Intellectual Property Organization Standing Committee on Copyright and Related Rights, Ninth Session (Geneva), June 23 to 27, 2003, SCCR/9/7, April 5, 2003, at 30-32.

<sup>42</sup>Specifically, Section 31D provides, in its entirety, the following:

“31D. (1) Any broadcasting organisation desirous of communicating to the public by way of a broadcast or by way of performance of a literary or musical work and sound recording which has already been published may do so subject to the provisions of this section.

(2) The broadcasting organisation shall give prior notice, in such manner as may be prescribed, of its intention to broadcast the work stating the duration and territorial coverage of the broadcast, and shall pay to the owner of rights in each work royalties in the manner and at the rate fixed by the Copyright Board.

(3) The rates of royalty for radio broadcasting shall be different from television broadcasting and the copyright Board shall fix separate rates for radio broadcasting and television broadcasting.

(4) In fixing the manner and the rate of royalty under sub-section (2), the Copyright Board may require the broadcasting organisation to pay an advance to the owners of rights.

(5) The names of the authors and the principal performers of the work shall, except in case of the broadcasting organisation communicating such work by way of performance, be announced with the broadcast.

(...continued)

“conditions” may be set (and with respect to musical works and sound recordings, does not comport with Berne Article 13(1)). It does not indicate as a default that private contractual agreements shall govern. It threatens to throw existing copyright arrangements with respect to both audiovisual works, sound recordings, and musical compositions into chaos.<sup>43</sup>

The Section 31D compulsory license reads as far broader than the “conditions” permitted by Article 11 *bis* of the Berne Convention (and incorporated by reference into the TRIPS Agreement). The new provision does not provide for ability to freely contract, i.e., as a default, private contractual agreements should govern before the possibility of remuneration set by the “competent authority.” Section 31D also contains no such limitation on the kinds of broadcasts subject to the compulsory license, e.g., whether free-to-air television broadcasts (local or distant) or encrypted pay broadcasts, or whether by wire or wireless means.

The Draft Rules addressed the administration of some but not all of the compulsory licenses. The Draft Rules did not include provisions for the administration of the Section 31 license to “republish,” “perform ... in public,” or “communicate ... to the public by broadcast” any work (or sound recording) for which such use has been refused by the right holder “on terms which the complainant considers reasonable.” The Draft Rules do address other compulsory licenses, such as the Section 31A compulsory license to “publish” or publish a “translation thereof in any language” ... “unpublished” ... [or] “published works” for which “the author is dead or unknown or cannot be traced, or the owner of the copyright in such work cannot be found,” the Section 31B compulsory license included for the benefit of the disabled, and the Section 31D broadcast statutory license which covers both radio broadcasts and television broadcasts. While not endorsing the adoption of these licenses or their application to foreign subject matter, the Draft Rules should confirm a narrow scope and application of the licenses, and drafters can look to the Berne Appendix for guidance on ways of achieving this. As just some examples, drawing from the Berne Appendix, the Rules should at least confirm that:

- 1) any such licenses are only available when the applicant “has requested, and has been denied, authorization by the owner of the right” ... “or that, after due diligence on his part, he was unable to find the owner of the right”;
- 2) if the works or sound recordings in question are made available at “a price reasonably related to that normally charged in the country for comparable works,” the license is not available;
- 3) any such licenses apply to limited purposes, e.g., “only for the purpose of teaching, scholarship or research”;
- 4) if the author or right holder chooses (e.g., on artistic grounds) to “withdraw from circulation all copies of his work,” the license should automatically terminate;

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(...continued)

(6) No fresh alteration to any literary or musical work, which is not technically necessary for the purpose of broadcasting, other than shortening the work for convenience of broadcast, shall be made without the consent of the owners of rights.

(7) The broadcasting organisation shall —

(a) maintain such records and books of account, and render to the owners of rights such reports and accounts; and

(b) allow the owner of rights or his duly authorised agent or representative to inspect all records and books of account relating to such broadcast, in such manner as may be prescribed.

(8) Nothing in this section shall affect the operation of any licence issued or any agreement entered into before the commencement of the Copyright (Amendment) Act, 2012.”

<sup>43</sup>In relation to the music industry, record producers and music composers enjoy an exclusive broadcasting right under Indian law. This right is seriously undermined by Section 31D. Under this license, broadcasters would not need permission to use works but simply need to notify their intention to broadcast the work and pay royalties as prescribed by the Copyright Board. The compulsory statutory license would diminish the exclusive nature of the broadcasting right, effectively turning it into a mere right to receive royalties. This would not only negatively impact on creators’ ability to negotiate license terms with broadcasters, but would also cause significant losses to right holders in terms of costs they will need to bear in Board proceedings. There are not even any limiting conditions, for example, a time period (e.g., of three years) before newly released recordings become subject to any license regime, the requirement that a license only be contemplated under the rare circumstances that right holders and broadcasters fail to achieve a negotiated agreement, or that “the rate paid by the broadcasters should reflect what would have been agreed between a willing seller and a willing buyer.” The intervention of the Copyright Board should only take place as a last resort.

5) six months must elapse between the sending, “by registered airmail,” of the application for a license and the granting of a license to the competent authority as well as “to the publisher whose name appears on the work and to any national or international information center which may have been designated” when the author or right holder cannot be found;

6) if copies of the work in question are already available to the general public “to the general public or in connection with systematic instructional activities” by the right holder or with his authorization, “at a price reasonably related to that normally charged in the country for comparable works,” any license granted shall be terminated; and

7) appropriate time limits are established (e.g., the Berne Appendix time frames are no longer than three or five years).

Without these safeguards and more, it will be difficult for the Indian government to ensure that its licenses do not run afoul of India’s international obligations under the Berne Convention and the TRIPS Agreement.

**Inadequate Protection for Technological Protection Measures Against Unlawful Circumvention, and Rights Management Information (RMI):** The Act left unchanged the previous draft amendments which sought to implement the anti-circumvention provisions (protection of TPMs) of the WCT (Article 11) and WPPT (Article 18). While India has not yet ratified these treaties, the amendments are intended to address the WCT and WPPT issues to make India ready for such ratification.

- **Technological protection measures:** Section 65A of the Act remains of concern as, on its face, it is incompatible with the WCT and WPPT. The provision falls short of international best practices without some clarifications and possibly revisions. IIPA has proposed certain of these through the Draft Rules process, as noted below.
  - The Act as amended does not expressly cover access controls as is required by the treaties.<sup>44</sup> It should define “effective technological measure” as “any technology, device, or component that, in the normal course of its operation, controls access to a protected work, performance, phonogram, or other protected subject matter, or protects any copyright or any rights related to copyright” to ensure proper coverage. IIPA has recommended that the Rules could confirm this definition of “effective technological measure.”
  - The Act appears to cover only the “act” of circumvention and only when the person engaging in circumvention activities acts “with the intention of infringing” an exclusive right.
  - The Act does not expressly prohibit manufacturing, importing or trafficking in circumvention technologies, devices, or services and merely requires that person to keep a “record” of the names and addresses and other “particulars” of the person using such device or service to circumvent. This is highly unfortunate.<sup>45</sup> Working within the framework of the Act as amended, the Draft Rules, referring to Section 65A of the Act, impose a recordation requirement on entities that “facilitate[e] circumvention of technological protection measures for another person.” Without more far-reaching amendments to outlaw trafficking, such a recordation requirement is critical to ensuring that only individuals with a legitimate non-infringing objective will seek to make use of circumvention services. To ensure that this objective is not undermined, the recordation requirement should be extended to include:

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<sup>44</sup>Many digital rights management (DRM) and product activation systems, for example, function by controlling access to works, and it is essential that these be covered by the anti-circumvention provision.

<sup>45</sup>From a practical enforcement perspective it is more effective, and less intrusive, to target businesses that traffic in circumvention tools than to target individuals who carry out acts of circumvention. With circumvention devices and services widely available globally on the Internet and from sources without any locus in India, a “record keeping” obligation cannot come close to meeting the treaties obligation to provide “adequate legal protection and effective legal remedies” against circumvention of TPMs.

- information about the tools used to circumvent;
- the provision under which the exception to the prohibition on circumvention is based;
- the underlying work and subject matter being accessed by virtue of the circumvention; and
- a declaration that under no circumstances will the underlying work be subject to onward distribution, transmission, making available, public performance, or communication to the public.

The Rules should also provide for regular audits of such records by the Ministry of those facilitating circumvention. The Rules should in no case allow for indemnification of the person facilitating circumvention. Furthermore, the Draft Rules provide that the records being kept by the person “facilitating” circumvention may only be disclosed to police (“not below the rank of a sub-inspector of police”) upon a “court order.” The Rules should not limit disclosure in this way (especially within the government), and should provide a mechanism as well for right holders to obtain access to records where there is strong indication that circumvention is taking place contrary to the law.

- The Act does not define an “effective technological measure.”
- The Act would permit circumvention to take advantage of any exception, such as fair dealing, contained in the Copyright Act (thereby potentially eviscerating protection), and creates other overbroad exceptions.<sup>46</sup> While this exception provision clearly places India outside the scope of the “adequate and effective” protection needed regarding unlawful circumvention, there may be ways to limit the scope of this provision through the Draft Rules. The Draft Rules currently permit a person to “approach anyone who can assist him to circumvent the technological protection measures.” The Draft Rules should at the very least limit the scope of entities eligible to assist in circumvention, e.g., an approved list by the Ministry of those who it has verified will keep proper records and ensure that no act of circumvention is performed outside of any permitted purpose.
- The Act provides for criminal remedies, but not civil remedies.<sup>47</sup>

In addition to the above, IIPA has indicated that in no case should the Draft Rules condone the online provision of circumvention services due to elevated risk for abuse, and because of the likelihood that such services will be made available to individuals in countries where such conduct is proscribed by law. The Standing Committee in approving Section 65A suggested that the judiciary could evolve the law to cover TPMs applied to control access to works. It is hoped that this and other changes can be confirmed through future explanation or technical amendments, namely, to ensure that: 1) access controls are covered (e.g., through a proper definition of “effective technological measures”), 2) manufacturing, importing or otherwise trafficking in circumvention technologies, devices, or services are prohibited, 3) exceptions are limited to those which will preserve the adequacy and effectiveness of protection, and 4) civil as well as criminal remedies are available against unlawful circumvention.

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<sup>46</sup>It is critical that any exceptions or limitations be narrowly tailored to avoid a scenario in which an exception effectively “swallows” the rule. The currently drafted 65A(2)(a) is, therefore, not an appropriate starting place, since it exempts all acts of circumvention “for a purpose not expressly prohibited by this act” which would seem to subsume all limitations and exceptions. By contrast, U.S. law provides narrowly tailored exceptions designed to facilitate specific uses, and also provides for a triennial rulemaking undertaken “to determine whether there are particular classes of works as to which users are, or are likely to be, adversely affected in their ability to make noninfringing uses due to the prohibition on circumvention of access controls.” Since 2001, only a few narrowly tailored classes of works have been identified. The EU approach is to ensure that “right holders make available” the “means of benefiting from” a certain narrow list of exceptions, and have special provisions related to private use, with appropriate safeguards in place with respect to limiting the number of copies that can be made and with regard to the Berne three-step test.

<sup>47</sup>Civil liability is important for several reasons. First, given limited law enforcement resources, private enforcement through civil litigation would be a critical adjunct to ensure the provision has the desired deterrent effect. Second, a civil cause of action is necessary to ensure that right holders are appropriately compensated for any losses they suffer as a result of circumvention.

- **Rights management information (RMI):**<sup>48</sup> The amendments define RMI to mean the title or other information identifying a work or performance, the name of the author or performer, the name and address of the owner of rights, terms and conditions regarding the use of the rights, and any number or code that represents this information (new Section 2(xa)). The definition expressly excludes any device or procedure intended to identify the user. The exclusion of devices or procedures intended to identify the user from the definition of RMI may hamper the ability of right holders to identify persons who have tampered with RMI, consistent with the WCT and WPPT.

**Failure to Deal Adequately with Online Infringement or to Promote ISP Responsibility:** A sound approach to this issue of dealing with online violations of law and the role of intermediaries is contained in the Information Technology Act, 2000, which provides for power to intercept or decrypt information through any computer source on certain grounds mentioned therein.<sup>49</sup> The IT Act provides that local ISPs bear responsibility for infringements on their networks after they have been put on notice and have knowledge of infringement. In 2010, the Parliamentary Committee urged that the Copyright Act be aligned with the principles laid out in the IT Act, recommending that a designated authority for managing copyright issues and piracy should be created with sufficient policing powers. In April 2011, the Information Technology (Intermediaries Guidelines) Rules, 2011<sup>50</sup> were issued, making some important clarifications to the Information Technology Act, 2000 (21 of 2000), for example, specifically mentioning “copyright” infringement as a trigger for a notice from an “intermediary,” and setting takedown times for detected violations online to 36 hours. The Rules indicate the trigger for “disabling” access is “actual knowledge” through a notice and they do not appear to provide for red-flag notice (i.e., where the “intermediary” is aware of facts or circumstances from which an infringement is apparent) which is unfortunate. Also, since they carve out from the notice and takedown requirement certain transient reproductions without regard to whether the transaction taking place is an authorized one, questions remain as to how effective the Rules along with the IT Act will be in addressing infringements in the non-hosted environment.<sup>51</sup>

Taken in this context, the Copyright Act (as amended by the “Notice”) is a missed opportunity to comprehensively deal with the issue of online infringement and the role to be played by ISPs over infringements of third parties, and leaves some important matters unclear. Section 52(1)(c) provides an exception for the following:

“transient or incidental storage of a work or performance for the purpose of providing electronic links, access or integration, where such links, access or integration has not been expressly prohibited by the right holder, unless the person responsible is aware or has reasonable grounds for believing such storage is of an infringing copy.”<sup>52</sup>

A proviso states:

“Provided that if the person responsible for the storage of the copy has received a written complaint from the owner of copyright in the work, complaining that such transient or incidental storage is an

<sup>48</sup>Article 65B provides a criminal remedy including up to two years imprisonment and/or a fine for violations involving rights management information.

<sup>49</sup>The IT Act 2000 also provides the power, but not the duty, to monitor information through any computer source on certain grounds mentioned therein. IIPA does not support any duty to monitor computer systems or services.

<sup>50</sup>*Information Technology (Intermediaries Guidelines) 2011*, April 11, 2011 (on file with IIPA).

<sup>51</sup>*The Information Technology (Intermediaries Guidelines) Rules, 2011* provide that an “intermediary” (as defined in the Information Technology Act, 2000) is not deemed to be directly liable for certain “temporary or transient storage” regardless of knowledge or red-flag knowledge and without regard to the legality of the temporary or transient storage, or of the transaction taking place across its network. Specifically, Section 3(3)(a) essentially provides that a service provider shall not be directly liable for the “temporary or transient or intermediate storage of information automatically within the computer resource as an intrinsic feature of such computer resource, involving no exercise of any human editorial control, for onward transmission or communication to another computer resource.”

<sup>52</sup>This new exception appears to confirm that the reproduction right under the Copyright Act, 1957, covers temporary copies, such as those made in the random access memory of a computer or other electronic device. The IT Act and the Information Technology (Intermediaries Guidelines) Rules, 2011 also appear to confirm such coverage, in that they provide an exception with respect to a narrow subset of temporary or transient reproductions. Sections 52(b) and (c) also provide for exceptions from the exclusive right of reproduction for the transient and incidental storage of works in certain circumstances, and applying the *a contrario* principle it would appear that all such copies, including those not subject to such exceptions, are protected as reproductions.

infringement, such person responsible for the storage shall refrain from facilitating such access for a period of twenty-one days or till he receives an order from the competent court refraining from facilitating access and in case no such order is received before the expiry of such period of twenty-one days, he may continue to provide the facility of such access.”

By crafting the ISP provision as an exception rather than establishing liability and creating safe harbors for ISPs that cooperate to remove or halt online infringements, the Act creates some ambiguity and uncertainty. The following is a summary of some of the issues raised by the Act, noting areas on which IIPA would seek clarity.

- **Scope of Activities Covered Should be Clarified:** The scope of activities covered is unclear, including “transient or incidental storage” undertaken “for the purpose of providing electronic links, access or integration.”<sup>53</sup> It would be helpful to confirm, perhaps through the Draft Rules process, that information location tools, facilitating access to infringing materials, and non-hosted services that provide “electronic links or access” to infringing materials are covered under the new provisions and subject to the knowledge and notice requirements.
- **Define “Person Responsible”:** The exception is not applicable if “the person responsible” has actual or constructive knowledge. It is unclear who is included as the “person responsible,” which presumably would include the service provider providing links, access or “integration.”
- **Define “Integration”:** It would be helpful to define the term “integration” to include information location tools, facilitating access to infringing materials, and non-hosted services that provide “electronic links or access” to infringing materials.
- **Notice in Addition to Actual or Constructive Knowledge Should Trigger Immediate Takedown Responsibility:** The exemption will not apply if the “right holder” ... “expressly prohibit[s]” the provision of “such links, access or integration,” or if the “person responsible” has actual or constructive knowledge that “such storage is of an infringing copy.” Notices, or knowledge or constructive knowledge, should trigger a responsibility on the part of the service provider (“person responsible”) to immediately take down infringing materials or disable links or access to infringing materials. This is especially important in the case of materials not yet released to the public, or so-called “pre-release” materials, or other materials at the beginning of their commercial life-cycles. We highlight that in such cases, takedowns should be carried out urgently, and certainly should not take days.
- **Need for Expeditious Takedown, No Automatic Put Back:** The proviso contains a period lasting 21 days that the “person responsible” must “refrain from facilitating such access” and requires the right holder to obtain a court order within that 21 days to avoid the “person responsible” from “continu[ing] to provide the facility of such access” to the alleged infringement. There is nothing in the Act defining the speed with which a service provider must react to actual or constructive knowledge or a notice. Under the IT Act 2011 Rules, the takedown time for detected copyright infringements online is 36 hours (which is too long, especially with respect to content such as pre-release materials as noted above). In addition, there should be no automatic put back after 21 days, with put back occurring only if: 1) there is a counter notice; and 2) the right holder fails to obtain a court order or fails to provide a copyright registration certificate. Requiring the right holder to obtain a court order under any circumstances, even when there is no counter notice, imposes a significant burden.<sup>54</sup>
- **Fair and Effective Policies for Non-Hosted Infringements and to Address Infringements Affecting India Instigated from Domestic or Foreign Websites:** To the extent not covered in the current Act, the Indian

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<sup>53</sup>This list suggests some coverage of information location tools and facilitating access to infringing materials – which are some, but not all, of the activities for which an effective response is needed to online infringement.

<sup>54</sup>In the U.S. and other jurisdictions, once allegedly infringing content is taken down in response to a right holder’s notice, the burden falls on the affected party to object to the takedown. Only then is it necessary for a right holder to seek a court order. This approach works well in practice, and is burdensome to neither the right holder nor the affected party.

government should implement fair and effective policies to deal with non-hosted infringements and repeat infringers, and include effective mechanisms to stop users accessing infringing content through domestic and foreign websites.

**National Exhaustion:** While the “Notice of Amendments” did resolve the exhaustion issue (i.e., it retains protection against unauthorized imports of works), publishers report that the National Council of Applied Economic Research (NCAER) is currently reviewing a provision that would damage the Indian exhaustion regime. Adopting such a provision would seriously undercut the current low-priced editions program that publishers offer to Indian students and consumers and would jeopardize the future of such a program. In addition, Indian publishers would be harmed by the volume of international books that could be imported into India from abroad and would lose control over the territorial reach of their own books, contrary to the traditional principles of copyright embodied in sections 19 and 30A of the Copyright Act (as amended).

**Overly Broad Exceptions:** The proposed changes to Section 52 in the Act create a number of new and overbroad exceptions to protection, some of which are particularly dangerous in the networked environment. The Act also leaves in place other exceptions which have troubling implications on India’s Berne Convention and TRIPS compliance, especially if extended into the digital environment.

- **New Broad “Private or Personal Use” Exception (Section 53(a)(1)).** The industries are concerned that the exception in Section 52(1)(a)(1) could be interpreted in overly broad ways. We appreciate the Indian government’s explanations to alleviate industry concerns that the exception for private use could be read to permit video recording or camcording in theaters by further limiting the exception for private use to “private and personal use.” However, we remain concerned that this narrowing of the language does not alleviate the foreseeable difficulties with such an exception as a broad exemption can completely undermine the anti-piracy efforts currently being undertaken by the film industry to stop camcording in theatres. A private use exception, even one further limited to “private and personal use,” must still comply with the three-step test in the Berne Convention and TRIPS. It would be important to further limit the exception through an explicit recitation of the three-step test, and an explanation that the exception would rule out any act in which a use rendered a work or other protected subject matter available online or to anyone outside the person entitled to use under this exception, would certainly rule out copying of whole or part of a cinematographic work in a movie theater, and could be claimed only by the person who is entitled to a permitted use, and not by any other party or service.

Concerns also remain over existing overbroad exceptions for copying of computer programs for backup (Section 52(1)(aa)), including a provision allowing such copying for any “noncommercial personal use” beyond the usual making of a back-up copy (Section 52(1)(ad)). IIPA proposes that the Draft Rules limit the number of copies which may be made under exceptions for copying of computer programs, for backup, including a provision allowing such copying for any “noncommercial personal use” beyond the usual making of a back-up copy. Concerns are also expressed over an exception permitting the performance of films in educational contexts and in “clubs” (Section 52(1)(i)); IIPA proposes that this exception be limited in the Draft Rules. IIPA expresses concern over the disability exception (Section 52(1)(zb)), e.g., the term “accessible format” includes “talking books” and “digital formats such as MS Word, pdf, epub etc.” as well as “all other formats that can be used by persons with disabilities.” The Draft Rules should limit the scope of this exception by ensuring that the beneficiaries of such exceptions are individuals who are eligible or who may qualify to receive books and other publications produced in specialized formats. These and certain other exceptions must be scrutinized in conjunction with India’s obligations under the Berne Convention and the TRIPS Agreement.

**Other Issues:** The Indian government missed some opportunities to further modernize the Copyright Act in this latest amendment process and should consider additional amendments to the Act and other laws that would be beneficial to foreign and Indian right holders alike:

**1) Confirm That Camcording of a Motion Picture is Illegal:** With the increase in illegal camcording of movies in theaters in India, the Indian government should adopt national legislation making it unlawful to possess an audiovisual recording device (such as a video camera or other device) with the intent to make (or attempt to make) a copy, in whole or in part, of a motion picture while inside a theater, and to prohibit the unlawful onward distribution or transmission (e.g., wireless upload to the Internet) of the camcordered copy. The emerging trend is to provide explicit protection against this activity, and the U.S. and several other countries already have legislation in force, while other countries are considering bills which accomplish the same. We hope this activity will be prohibited in the Cinematograph Bill which emerged in 2010.

**2) Deal with Damaging “Pre-Release” Piracy:** It is exceedingly important to preserve the market for creative products in India prior to or during the first weeks of a product’s release. The Indian government should adopt provisions that provide for increased civil and criminal penalties in cases involving defendants who make available to the public pre-release works.<sup>55</sup>

**3) Adopt Statutory Damages:** Proving actual damages, e.g., in end-user software, book publishing, and other piracy cases, can be difficult, and in order to expedite civil judicial processes and provide much-needed deterrence to a civil regime which relies almost completely on interim injunctions and Anton Piller orders to deal with piracy, India should adopt statutory damages at the election of the right holder.

**4) Allow Seizure Orders as a Matter of Right:** The Indian government should provide that seizure orders are granted to copyright owners as a matter of right in civil cases.

**5) Allow for Restitution in Criminal Cases.**

**6) Amend Tax Laws to Make Software Piracy a Form of Tax Evasion:** A study conducted by research firm IDC examining the direct and indirect tax implications of software piracy in India found that it cost the State exchequer \$866 million in tax receipts in 2009. The Indian government should amend Indian tax laws to classify software piracy as a form of tax evasion and define corresponding tax violation rules in line with international best practices. Further, governmental tax inspectors and external and internal auditors should be empowered to check and account for genuine software licenses inside public and private companies.

**7) Enhance Corporate Audit and Disclosure Requirements:** The Indian government should amend the Companies Act, 1956 to require software compliance audits by duly qualified and appointed auditors. Such requirements might be targeted by reference to a minimum threshold (for example, revenue, total assets, etc.) to determine the set of companies to which such an audit requirement would apply. Corporate disclosure rules should also be revised to require more specific disclosure of genuine software licenses.

**8) Adopt Policies to Ensure Legal Software Use and Software Asset Management (SAM) Best Practices in Government Agencies and Promote the Same With Private Enterprises:** The Indian government should issue a directive or strict policy guidelines mandating all government departments across the country use legal software and follow due diligence while procuring software assets. This would ensure software license compliance in government, protect government system from security vulnerabilities and send a strong message about the importance of software license compliance to the private sector. The government should also adopt software asset management best practices and promote these with private enterprises.<sup>56</sup>

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<sup>55</sup>For example, the U.S. Family Entertainment and Copyright Act of 2005 contains effective civil and criminal provisions to deter online pre-release piracy.

<sup>56</sup>As noted above, BSA and the Department of IT established a roadmap for promotion of SAM best practices in government and private enterprises in a joint report they issued in November 2011. BSA’s new “Certified in Standards-based SAM for Organizations (CSS(O))” program – the first SAM program aligned with ISO standards – is one possible model which may be followed.

**9) Patent Pendency:** The software industry faces a significant and long-standing backlog of patent applications in India. Over the past five years, only 37% of the patent applications filed in India (and available for examination) have been examined by the Intellectual Property Office. The current backlog currently stands at approximately 100,000 applications across all industries. Due to this backlog, a significant portion of our members' intellectual property is not adequately protected in India. While we recognize that measures have been taken by the Indian government to address this backlog, including by the recent hiring of new examiners, we believe more needs to be done to address the significant increase in the number of patent applications in India, particularly in the ICT sector. As a result, there is a risk that the backlog may increase rather than decrease in the coming years, despite these measures. We urge the Indian government to address this backlog as a priority. Doing so is important to promote R&D investment, ICT innovation, and national competitiveness in India.

**10) Adopt an Effective Optical Disc Law:** Since India still has a reported 36 optical disc factories, industry along with FICCI have been engaged in the drafting process for an effective OD law. The issue has long been delayed by the controversy over coverage of blank discs, which some (including Moser Baer) oppose.

**National IPR Strategy:** During the fall of 2012, the Department of Industrial Policy and Promotion (DIPP), having established the Sectoral Innovation Council on IPR, initiated a process to review a *Draft National IPR Strategy*, inviting views of stakeholders. The SIC's stated goals of the National IPR Strategy were "for encouraging innovation with a view to adequately address the key concerns of sustainable development," as well as "to formulate the medium term policy objectives that can be the building blocks of the envisaged IPR strategy," and include recognition of the need to establish a National IP Enforcement Taskforce. IIPA and BSA submitted comments in the process. In IIPA's comments, we note the importance of properly defining intellectual property rights,<sup>57</sup> that copyright and creativity have long played an important role in India's economic development,<sup>58</sup> and the importance of providing adequate and effective levels of protection and enforcement in India as a means to achieve the goals of the IP system (citing the priority actions from the 2011 Special 301 report as guideposts). BSA's submission highlighted the need to, among other things, 1) cover software under the Goondas Acts which recognize the link between piracy and organized crime; and 2) make software-specific changes to the Copyright Act consistent with this report; 3) make changes to disclosure and audit requirements in the Companies Act, 1956, to ensure that companies are properly procuring and licensing software; 4) establish a "National Intellectual Property Council" under the Prime Minister's Office to monitor progress of the National IPR Strategy and for other purposes; 5) put into place a directive or strict policy guideline mandating all government departments across the country use legal software and follow due diligence while procuring software assets, including the adoption of latest software asset management (SAM) practices; and 6) not discriminate in procurement or adoption practices on the basis of their business model, their place of origin, or the type of technology they employ.

## **MARKET ACCESS ISSUES**

India currently imposes significant market access hurdles on the motion picture, entertainment software, book publishing, and software industries.<sup>59</sup> One reason for this is the various taxes and charges that are imposed on right holders at various points in the distribution or dissemination of creative product in India. One measure which the Indian Parliament is considering is the Goods and Services Tax (GST) expected to be taken up in the 2013 Parliamentary Budget Session. Some hurdles remain to achieving consensus on the GST, particularly in regard to the states' views on 1) fiscal autonomy, 2) revenue-neutral rates, and 3) which items will be included in the GST list.

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<sup>57</sup>The drafters defined an intellectual property right as "a private right recognized within the territory of a country and assigned to an individual or individuals for a specific period of time in return for making public, the results of their creativity or innovation." This description encompasses some key aspects of intellectual property, but IIPA suggested that the drafters refer to the World Intellectual Property Organization (WIPO) descriptions of intellectual property to ensure a complete description. WIPO defines intellectual property as "creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce."

<sup>58</sup>Here we noted the UNCTAD, MPDA, and PricewaterhouseCoopers reports mentioned above.

<sup>59</sup>Many barriers are set forth in documents such as the FICCI "Key recommendations for Media & Entertainment Sector presented to the Finance Ministry" (February 2011), and in general, we concur with FICCI's findings therein.

Nonetheless, adoption of the GST could resolve many issues below related to entertainment taxes, high tariffs on entertainment and double taxation.<sup>60</sup>

**Motion Picture Barriers:** The U.S. motion picture industry faces numerous market access barriers in India.

- **TRAI Bans Exclusivity, Includes “Must Provide” in the Pay TV Sector; MIB Also Restricts “Direct-to-Home” Business:** A 2007 Telecom Regulatory Authority of India (TRAI) regulation creates a potentially Berne- and TRIPS-incompatible ban on exclusivity (prohibiting broadcasters from granting exclusive contracts with any distributors) combined with a “must provide” requirement (obligating broadcasters to provide channel programming to all requesting distributors on a nondiscriminatory basis). The exclusive contract prohibition, along with “must provide” requirements, eliminates all potential for competition and any incentive to develop programming or buy any “rights.” The industry has made numerous submissions to the Indian government, opposing restrictions in the functioning of India’s cable and satellite market, arguing that the draft regulation would remove private parties’ ability to negotiate standard free market transactions and would ultimately limit the quality and quantity of legitimate content available to consumers. This regulation eliminates all potential for competition and any incentive to develop programming or buy any “rights” and should be deleted or significantly altered.
- **Restrictions on Direct-to-Home (DTH) Market:** The Ministry of Information and Broadcasting (MIB) has also taken similar restrictive steps with respect to the DTH market (the reception of satellite programs with a personal dish in an individual home). Specifically, it issued Guidelines to include, among other things, prohibitions against DTH operators from entering into exclusive contracts with any broadcaster; and prohibitions against DTH operators carrying signals of any broadcaster who has entered into any exclusive contracts with any distribution medium and/or against whom any litigation is pending in such regard. These regulations and guidelines limit choice and undermine anti-competition laws.
- **Price Controls on Pay TV Sector:** TRAI has also introduced price caps for pay channels and “price bands” for bouquets in areas with set-top-boxes. TRAI says they will relax the price controls once other television platforms are widely adopted (e.g., satellite TV, Internet Protocol TV). Such rate regulation is stifling to the growth of this clearly competitive industry sector, and TRAI should make a strong commitment to relax price controls.
- **Foreign Ownership Restrictions:** Foreign ownership/investment in cable television systems is limited to 74%. IIPA opposes such ownership restrictions, which ignore the fact that significant capital infusion, which may be accessed from international markets, is necessary to further develop the television industry in India. A task force in the Ministry of Information and Broadcasting (MIB) was set up to re-examine the foreign ownership caps in broadcasting, particularly in electronic commerce, but there have been no reports of its conclusions.
- **Entertainment Taxes:** Entertainment taxes vary widely among Indian States, ranging from 15 to 40% in some key markets, and from 40 to 70% in other States. The average tax rate, computed on a country-wide basis, is estimated to be between 27-36%, and constitutes a significant disincentive to investment in the industry, including in the much needed area of cinema construction. The film industry, including the MPAA’s India group, in association with the Film Federation of India, continues to encourage the Federal and various State governments to rationalize the high taxation levels and the Indian government has also stepped in to persuade various State governments to impose a uniform entertainment tax not exceeding 60%. Citing revenue considerations, however, most states are reluctant to conform. In addition, at the request of their local state film industry representatives, some states discriminate between local and non-state originated films, charging nothing (or even offering incentives) for local films, while assessing higher rates for non-state originated films.

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<sup>60</sup>CNBC-TV18, Budget 2013: GST stuck between states' demands, India Inc's pleas, SME Mentor, January 17, 2013, at <http://www.moneycontrol.com/smentor/news/indian-markets/budget-2013-gst-stuck-between-states-demands-india-incs-pleas-808898.html>.

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

- **Price Fixing on Theatrical and Quotas:** The Indian government in various of the southern states has engaged in price fixing on tickets as well as quotas on the number of screenings per title per day.
- **Onerous Restrictions on Satellite Services:** For years, foreign content providers wishing to make their programming available by satellite have been stymied by onerous restrictions on their ability to uplink and downlink satellite signals beaming into India. Under 2005 Guidelines, foreign broadcasters are required, among other things, to set up offices in India, be subject to licensing by the government, and pay prescribed fees per channel beaming into India.
- **Disruptive Content Control Rules for Television:** In August 2006, the Ministry of Information and Broadcasting issued a notification to broadcasters that only films rated “U” can be broadcast on TV channels. This change was reportedly in response to public concern over increasingly offensive scenes shown on television. In addition, the Mumbai High Court issued a judgment that same month requiring broadcasters to recertify all films through the Central Board of Censors to ensure that only “U” rated films are aired. These decisions, unfortunately made without industry consultation and without supplementing Censor Board resources, have introduced uncertainty and disruption in the marketplace.
- **Service Taxes on Transfers of IP:** IIPA notes positively the addition of temporary transfers of IP rights to the Negative List, but also notes that litigation (Constitutional challenges filed by local Hindi studios in July 2010 and Motion Picture Association members in September 2010 in the Delhi and Mumbai High Courts) remains pending for the 2010-2012 period. A further service tax has now been imposed on the “input”/production side (i.e., the services of actors, composers, and musicians) which cannot be offset, with negative effects on those who produce locally or are engaged in local co-productions.

**High Tariffs on Entertainment Software and Hardware Products:** Entertainment software publishers continue to be hindered by the existence of high tariffs on PC game products, console game products, game console hardware, and game activation cards. Additional taxes compound to create an environment where the market share of authorized hardware and software is only a fraction of what it would be under less restrictive market conditions. India maintains unbound tariffs on consoles and accessories, including activation and value cards used in software and online game transactions, creating an uncertain business climate for trade and investment in the Indian market.

**Taxation of Software:** An array of tax policies negatively impact market access for software goods and services in India. These include transfer pricing rules based on global profit split attributions to outsourced R&D activity in India and double taxation of certain software as both the sale of a good and service. IIPA urges that these and other problematic tax policies impacting market access for software be amended to be consistent with international practices.

**Technology and Procurement Mandates:** The Indian government has issued a number of policies that raise concerns they will be implemented in a manner that provides significant preferences and mandates for government procurement, and in some cases private sector procurement, of products and services that are locally manufactured, that utilize a particular technology, or that have IP owned and/or developed in India. These include the National Electronics Policy, the National IT Policy and the National Telecom Policy, all of which culminated in the February 2011 Preferential Market Access (PMA) policy and subsequent implementation guidelines. The PMA policy represents an unprecedented interference in the operations of U.S. IT and software companies in India by imposing onerous and discriminatory local content requirements on certain “electronic” goods and services. Importantly, the Policy imposes these requirements on both government and private sector procurements, which is clearly inconsistent with India’s WTO obligations. Moreover, the rules will apply to all “Managed Service Providers” operating in India.

As written, the PMA will capture software for a number of reasons: 1) the local content and value addition requirements will capture pre-installed software in relevant ICT hardware, including PCs, tablets, and printers that have already been notified for government procurement; 2) Indian government officials have verbally indicated to U.S. company representatives that software will be captured in some form by the policy, although they have not provided further details; 3) neither the February 2011 PMA document nor subsequent implementation guidelines create any clear distinction between hardware and software in local content/value addition calculations; and 4) the PMA policy's broad definition of an MSP as "a provider of Information Technology (IT) and Communications related services, who provide such services by establishing Information Technology (IT)/Communications infrastructure," could capture software and services. IIPA believes that an open and competitive market is an essential component of a world-class IT sector that fosters IP development. The Indian government should avoid policies that restrict market access through such mandates or stringent procurement preferences.

## **TRAINING AND PUBLIC AWARENESS**

IIPA member associations continued to conduct training in 2012. For example, the motion picture industry stepped up trainings, in particular, for movie theater employees at high-risk theaters, conducting "Make a Difference" trainings on investigative and enforcement techniques for over 1,200 theater staff. In addition, a roundtable discussion headed by the local Motion Picture Distribution Association (MPDA) was attended by Indian government authorities and representatives of the Multiplex Association of India to apprise the government and cinema industry of the alarming growth rate of illegal camcording in India. MPDA also made a presentation on the effects of piracy and the growing threat of online piracy to approximately 80 representatives of law enforcement at a conference jointly organized by the Central Bureau of Investigation (CBI) and Interpol. As in previous years, the local music industry and the International Federation of Phonographic Industries (IFPI) conducted several training programs for police and public prosecutors in Andhra Pradesh, Punjab, Mumbai, Delhi, West Bengal, Kerala, Tamil Nadu, Maharashtra, and also organized meetings with law enforcement and members of Parliament to discuss better implementation of IPR protections.

## **GENERALIZED SYSTEM OF PREFERENCES**

India enjoys preferential trade benefits under the Generalized System of Preferences trade program. Among the criteria the President must take into account in determining whether a country should continue to be designated as a GSP beneficiary country are "the extent to which such country is providing adequate and effective protection of intellectual property rights," and "the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets ... of such country." 19 USC 2462(c)(4) and (5). In 2011, India was the largest recipient of GSP preferences, with more than US\$3.73 billion worth of Indian goods entering the U.S. under the duty-free GSP code, accounting for almost 10.4% of its imports into the U.S. and around 20% of all U.S. imports under the program (US\$18.5 billion). In the first eleven months of 2012, more than US\$4.1 billion of India's exports to the U.S., or almost 11.1% of its total exports to the U.S., received duty-free treatment under the GSP code. India needs to continue to endeavor to meet the adequate and effective test under the statute to remain eligible to receive favorable treatment under the GSP program.

# INDONESIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Indonesia remain on the Priority Watch List in 2013 and supports the U.S. government's current evaluation of whether Indonesia is complying with its obligations under the Generalized System of Preferences (GSP) trade program due to intellectual property rights and market access concerns.<sup>1</sup>

**Executive Summary:** The piracy situation in Indonesia remains severe, and enforcement authorities and courts within the country have not succeeded in sufficiently curtailing copyright infringement. Due to constrained budgets and resulting problems in enforcement through IPO PPNS, Indonesian National Police (INP), and the Commercial Court in Jakarta, 2012 saw fewer raids and very little movement on infringement cases, whether administrative, civil or criminal. The National IP Task Force, whose establishment had once held out hope for a more coordinated enforcement effort to beat back piracy in the country, has shown little activity. Growing Internet piracy has been met by only limited attempts to halt this spreading problem. Compounding these issues, Customs has now instituted new procedures by which a court case must be initiated before a suspected import shipment will be detained. If true, this would amount to a clear-cut TRIPS violation. In addition, market access restrictions remain significant and must also be addressed. The Indonesian government has issued a draft copyright law, which makes some modest improvements, for example, with respect to dealing with Internet piracy, but heads in the wrong direction on other matters. Most importantly, even if the government is able to enact an improved legal framework, in the absence of true enforcement and judicial reforms, IIPA members fear that the endemic piracy situation will remain the norm in Indonesia.

### PRIORITY ACTIONS REQUESTED IN 2013

#### Enforcement Issues

- Institute comprehensive enforcement reforms, through establishment of a separate INP unit with separate, adequate funding and salaries to reduce irregularities; expansion of IPO PPNS team budget and mandating a certain number of copyright piracy raids each year; and establishing a select group of IP prosecutors, with a mandate to handle more IPR cases; all with the oversight of the Anti Corruption Commission.
- Bring and conclude more high-profile piracy cases, including against Internet piracy, mobile device or mobile network piracy, pirate distributors, warehouses, factories, enterprises engaged in end-user software piracy, and hard disk loading, an illegal practice where computer dealers pre-install pirated software into new computers for sale to companies and consumers.
- Follow through on the National IP Task Force's "Campaign" to take deterrent action against all forms of piracy.
- Establish a National IP Task Force website tracking prosecutions completed, including parties to the case, legal bases for prosecutions, penalties assessed, and evidence found during raids.
- Implement programs to ensure government ministries use only licensed software and promote the use of software asset management best practices by private enterprises.
- Commit to judicial reforms in the Jakarta Commercial Courts, and expand such courts in Medan, Semarang, Surabaya and Makassar to adjudicate copyright cases, establish special IP courts for criminal cases.
- Ensure Directorate of Special Crimes ('Ditreskrimus') and "Type A" Police Commands run sustained IPR police investigations with deterrent results.
- Retain *ex officio* enforcement authority and provide transparency in raiding.

<sup>1</sup>For more details on Indonesia's Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2013SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.



- Combat illegal photocopying, print piracy, and unauthorized translations, and work with right holder groups to legitimize the use of published materials at schools and universities.
- Provide Berne- and TRIPS-compatible presumptions of copyright ownership in practice.

### Legislative Issues

- Enact draft copyright law with changes noted in this submission.
- Ensure copyright infringement is considered a predicate offense under anti-organized crime laws that permit broader criminal investigation, seizure/freezing of assets, etc.
- Make optical disc regulations more effective by: 1) making inspections routine, unannounced and off-hours; 2) enforcing against source identification (SID) code violations, including gouging off or non-use of source identification codes; 3) providing transparency in raids and results; 4) covering imports of raw materials; and 5) ensuring that the Department of Industry collects exemplars.

### Market Access and Related Issues

- Now that Decree (BRTI) No. 177/2011 has been repealed, immediately initiate investigations into identifying parties involved in illegal ring tone and ring-back tone operations to restore the market to legitimate operators.
- Eliminate the “specific tariff” on imported films, and return to a duty consistent with the terms of the WTO Customs Valuation Agreement (CVA) determined on the basis of the underlying physical carrier medium.
- Permanently remove the requirement to replicate locally all theatrical prints and home video titles released in Indonesia.
- Eliminate provisions from the Film Law that would, if implemented, impose local screen quotas, pre-production content review requirements, a prohibition on dubbing imported films, and other restrictions on film industry.
- Amend the Negative Investment List to allow direct foreign investment in the audio-visual sector.

## PIRACY 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 unacceptably high in Indonesia, at 86% unlicensed PC software usage, among the highest in the world, and even higher for other industries (e.g., mall/retail and music piracy) due to piracy of all kinds – whether physical, Internet, or mobile.<sup>2</sup>

**Retail Piracy, Mall Piracy, Including Physical and Mobile Device Piracy Remain Rampant, With Numbers of Raids and Seizures Down Once Again in 2012:** Indonesia’s notorious markets<sup>3</sup> 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 in Blu-ray format), software, videogames, and published materials. Also problematic is mobile device piracy, in which illegal copyrighted files are loaded onto various mobile devices or carriers. 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. As immediate steps, in addition to enforcement reforms discussed elsewhere in the report, the Indonesian government should adopt landlord liability for the infringing activity of tenants, and should ensure that the business licenses of stores and distributors engaged in infringement are revoked.

<sup>2</sup>A 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>.

<sup>3</sup>Major cities including Jakarta, Padang, Java Island, Semarang, Medan, Makassar, Bandung, and Surabaya have hotspots replete with pirate materials. Notorious markets in 2012 included Harco Glodok, Ratu Plaza, Pinangsia Plaza, and Ambassador Mall/ITC, and Mangga Dua Mall. Other notorious spots in the Jakarta area include Glodok Penampungan, Jalan Pinangsia, and Glodok Jakarta. Harco Glodok was listed once again by USTR as a “notorious market” in its Out-of-Cycle Review of Notorious Markets. See United States Trade Representative, *Out-of-Cycle Review of Notorious Markets*, December 13, 2012, at <http://www.ustr.gov/sites/default/files/121312%20Notorious%20Markets%20List.pdf>. IIPA, in its Notorious Markets filing to USTR, also recommended Harco Glodok as a notorious market. See International Intellectual Property Alliance (IIPA), *Submission Re: IIPA Written Submission Re: 2012 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 77 Fed. Reg. 48583 (August 14, 2012), Docket No. USTR-2011-0011, September 14, 2012, at [http://www.iipa.com/pdf/2012\\_Sep14\\_Notorious\\_Markets.pdf](http://www.iipa.com/pdf/2012_Sep14_Notorious_Markets.pdf).

**Internet Piracy and Wireless Mobile Piracy:** The sea change we are witnessing in Indonesia, with 236.8 million mobile subscribers, or almost 98% penetration,<sup>4</sup> 55 million Internet users,<sup>5</sup> and more than 2.7 million fixed broadband lines,<sup>6</sup> means online and mobile piracy remains a growing problem,<sup>7</sup> 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.<sup>8</sup> The evasive behavior of online pirate services in Indonesia, switching online locations and website names to avoid detection, using other fraudulent practices, and using offshore servers, has created hurdles to effective enforcement.

**Enterprise End-User Software Piracy Causes Significant Losses:** The software piracy rate in Indonesia remains extremely high at 86%, including widespread use of unlicensed software by businesses and other enterprises.<sup>9</sup> Lowering software piracy would bring significant benefits to the Indonesian economy.<sup>10</sup> Indonesian law contains a provision criminalizing end-user software piracy (Article 72(3)), and the draft copyright law has a similar provision. In contrast with some other industries' experiences, BSA reported that the police provided good support for enterprise end-user enforcement by conducting around 70 end-user raids in 2012. In addition, in a recent case (*Multisari vs. BSA*) where a raided company countersued BSA, alleging, among other things, that the raid was unauthorized, the Central Jakarta District Court on January 15, 2013 dismissed the countersuit. This is an encouraging ruling and bodes well for future end-user enforcement.

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

**Book Piracy:** Piracy of published materials in Indonesia, especially academic books and journals, continues to be a major concern. A survey of the Greater Jakarta area revealed widespread infringement of academic books and journals at commercial copy shops in and around university campuses, as well as in university libraries. Online piracy of textbooks, reference, and trade books also appears to be increasing, likely from digital scans of analog books. While commercial-scale photocopying (mainly on and near university campuses) remains the primary

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<sup>4</sup>International Telecommunication Union, *Mobile-cellular Telephone Subscriptions per 100 Inhabitants 2000-2011*, at <http://www.itu.int/ITU-D/ict/index.html>, accessed on January 10, 2013.

<sup>5</sup>Internet users in Indonesia reaches 55 million people, The Jakarta Post, October 28, 2011, at <http://www.thejakartapost.com/news/2011/10/28/internet-users-indonesia-reaches-55-million-people.html> (citing Markplus Insight study).

<sup>6</sup> International Telecommunication Union, *Fixed Broadband Subscriptions 2000-2011*, at <http://www.itu.int/ITU-D/ict/statistics/material/excel/Fixed%20broadband%202000-2011.xls>, accessed on January 10, 2013.

<sup>7</sup>The independent film and television segment of the motion picture industry (IFTA) reports that online piracy remains a significant export constraint for independent producers and distributors, the majority of which are small- to medium-sized businesses. Independent producers partner with local authorized distributors to finance and distribute their films and programming in Indonesia. These authorized distributors find it almost impossible to compete with 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.

<sup>8</sup> *4Shared.com* is a popular "one-click hosting" site or cyberlocker site, and ranks as the 17th most visited site in Indonesia (<http://www.alexa.com/siteinfo/4shared.com#>).

<sup>9</sup>BSA | The Software Alliance's 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Indonesia was 86%, representing a commercial value of unlicensed software of US\$1.47 billion. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA's 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

<sup>10</sup>A 2010 study done by IDC for BSA found that decreasing Indonesia's software piracy rate by ten points over a four year period would add US\$2.43 billion to 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.

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 publishing industry hopes to work with the Indonesian government to devise and implement a plan to take meaningful action to address the rampant piracy observed in the market. As one step, the Indonesian government (Department of Education and Commission on Higher Education) should work with right holder groups to tackle the unauthorized photocopying problem by encouraging use of legitimate published materials at schools and universities. Publishers do note that some university professors have been encouraging students to buy only legitimate books. Universities should encourage all professors and teaching staff to do the same and should adopt university-wide appropriate use and copyright policies.

## **ENFORCEMENT UPDATES IN INDONESIA**

The enforcement system in Indonesia for copyright is broken and in need of reform. A new approach is required.

**Comprehensive Enforcement Reform:** A significant, multi-faceted enforcement reform process must now be instituted in order to have any chance to make significant progress against piracy in Indonesia in the near term. First, due to irregularities in the INP officers’ activities, we recommend that a separate, police team for IPR crimes, be established, perhaps as a pilot program in Jakarta, with proper funding and salary levels, and oversight of the Anti Corruption Commission. Second, the IPO PPNS team budget should be expanded, and investigation officers should be mandated to conduct a certain number of copyright piracy raids each year, all under the oversight of the Anti Corruption Commission. Third, a select group of IP prosecutors should be established, with a mandate to handle more IPR cases, and with the oversight of the Anti Corruption Commission. All of these activities should be accomplished under the direction of the National IP Task Force, whose efforts to date have been minimal. Enforcement officials have reportedly been reluctant to conduct regular enforcement actions because of the presence of organized criminal gangs. It is critical that copyright piracy constitute a predicate offense for organized crime statutes, such that Indonesian officials will feel more secure in targeting such criminals.

**Comprehensive Judicial Reform:** A similar approach to that on enforcement is needed in the courts, which are largely ineffective in the civil area (the Commercial Courts) and completely ineffective when it comes to criminal cases. First, to improve the civil Commercial Courts, reducing irregularities will be critical, through the Anti Corruption Commission working with the Supreme Court Ethics Committee to reduce their prevalence. Second, very few civil Commercial Court judges are familiar enough with: how IPR cases are conducted, damages calculations, implementation of injunctions, issuance of “Anton Pillar” orders, conducting IPR border seizures, and managing the proper balance between procedural defects and achieving substantive justice. What remains are only rudimentary judicial remedies, with extremely low, non-compensatory (and non-deterrent) damages, no detention, removal or destruction of goods orders, and unenforceable verdicts. Provisional injunctions were introduced in 2012, but none have yet been granted. “Anton Pillar” orders appear unavailable under the current law, based on the latest rules, but on a positive note the new draft copyright law appears to provide for provisional injunctions. Once a pilot program of judicial reform has been firmly established in Jakarta, IIPA recommends that Commercial Courts outside Jakarta be addressed.

The criminal courts face similar hurdles. Despite the Attorney General Letter No. SE-003/A/JA/02/2009, 26 February 2009 categorizing IP cases as “Important Cases” “in order to accelerate case prosecutions,”<sup>11</sup> in the few

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<sup>11</sup>The 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*, February 2011 (on file with IIPA).

cases that proceed to a conviction, most result in extremely low and non-deterrent criminal fines.<sup>12</sup> In one case, a Public Prosecutor in Lubuk Sikaping, Padang eventually (after a complaint to the National Public Prosecutor) brought a case against a suspect selling unlicensed music, seeking three years imprisonment. It was only due to the persistence of the industry that this case was brought, and only after significant delay; we have no information due to general lack of transparency on the case which was brought more than two years ago. IIPA continues to recommend establishing a National IP Task Force website to track case results.<sup>13</sup>

**Berne and TRIPS-Compatible Presumptions Not Being Afforded:** Industry has reported that court processes are sometimes hampered by defendants simply placing in issue the copyright ownership of the infringed work or sound recording, and reversing the 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. The new draft copyright law would provide a Berne-compatible presumption of ownership on the books, and it is hoped that this would halt the overly burdensome and costly cases in which ownership is wrongly placed in issue.

**Comprehensive Internet Enforcement Approach Needed:** There remains no enforcement infrastructure in Indonesia to deal with online or mobile piracy, a situation which hopefully will change with the passage of the new copyright law. In 2011, the Ministry of Information and Communication Technology (MICT) announcement that it would disable access to websites that distribute pirated files, indicating its focus on the site *4shared.com*, which it said was a high-capacity website that provided 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).<sup>14</sup> On October 15, 2012, the Directorate General of ICT Applications of MOCT sent a letter to *4Shared.com* demanding that they cease accepting, uploading, storing, or transferring content which causes losses to others particularly targeting violations of intellectual property rights. Unfortunately, the site is still accessible in Indonesia, as are pirated materials.

Despite the MOCT actions, in the absence of guidance from the law, ISPs have chosen to largely ignore piracy occurring within their reach. In addition to the passage of new legal measures which will help halt online infringements, 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.<sup>15</sup>

## **MARKET ACCESS AND RELATED ISSUES**

**Immediately Initiate Investigations Into Identifying Parties Involved in Illegal Ring Tone and Ring-Back Tone Operations.** In October 2011, the Information and Communications Ministry issued Decree (BRTI) No. 177/2011 which was aimed at phone credit fraud, but which has virtually destroyed the mobile phone ring tone and ring-back tone market for the music industry. 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)

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<sup>12</sup>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. Judgment No. 2537/Pid.B/2010 dated 28 February, 2011 against Ng Tek San, The North Jakarta District Court, February 11, 2011.

<sup>13</sup>All case records are manually written into a log book in each District Court, making it difficult to identify outcomes in particular cases, obtain copies of court decisions, contact public prosecutors requesting updates, and ultimately, leverage publicity on cases of copyright infringement and get the message to the public that copyright infringement is a serious violation of the law with serious legal consequences.

<sup>14</sup> See Tomi Tresnady, *Hari Ini, Kemenkominfo Tutup 20 Situs Musik Ilegal*, Okazone, July 27, 2011, at <http://music.okezone.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).

<sup>15</sup>In late 2011, the Indonesian government held talks with ISPs about their significant role in digital transactions. 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). Yet, no resolutions have been achieved. 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).

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 the entire ring-back tone market due to this new and unprecedented restriction, on top of having to deal with infringing/unauthorized ring tone and ring-back tone businesses. We understand the Decree was repealed, but it is now incumbent upon the Indonesian government to immediately initiate investigations into identifying parties involved in illegal ring tone and ring-back tone operations to restore the market to legitimate operators.

**Eliminate “Specific Tariff” on Imported Films and Return to a Duty Consistent with the Terms of the WTO Customs Valuation Agreement Determined on the Basis of the Underlying Physical Carrier Medium:** In 2011, Indonesia instituted a burdensome new duty on imported films, based on a methodology inconsistent with the provisions of the WTO Customs Valuation Agreement. This methodology incorrectly seeks to apply the CVA’s “transaction method” and thus to capture the value of the IP royalties associated with the exhibition of the films. The transaction method should not be applied to the importation of films for theatrical release because, as defined by the CVA, no “transaction” actually occurs. As such, the Indonesian government should properly apply the computed methodology, in which the valuation of film imports is made on a per-meter basis against the physical carrier medium, as is the norm in virtually every market in the world, and not an arbitrary (and highly unusual) specific tariff based on the film’s running time.

**Permanently Remove the Requirement to Locally Replicate All Theatrical Prints and Home Video Titles Released in Indonesia:** IIPA greatly appreciates the continued suspension of the longstanding Decree requiring the local replication of all theatrical prints and home video titles (e.g., DVDs).<sup>16</sup> However, we look forward to working with the Indonesian government to obtain formal and permanent elimination of this requirement as soon as possible. If the Decree was ever implemented, it would negatively affect foreign motion picture companies’ release and distribution schedule for the country, and would raise concerns over existing local facilities’ ability to handle its volume and quality output requirements as well as lab and duplication facility security issues. The specter of the Decree threatens to have serious negative consequences on the long-term viability of Indonesia’s film industry, threatens the continued development of local cinemas, and jeopardizes arrangements local filmmakers have for post-production work overseas. The Decree remains opposed by local Indonesian filmmakers.

**Eliminate Problematic Provisions from the Film Law:** The 2009 Film Law contains provisions that, if implemented, would limit foreign participation in various aspects of the film businesses and as such would be inconsistent with the U.S.-Indonesia Letter Agreement on Market Access for Films and Videos. The local filmmaking industry opposes the Law. The Law includes a 60% local content (screen) quota for local exhibitors, and a ban on the dubbing of imported films. Other restrictions include: 1) Articles 10 and 20 that require the maximization of Indonesian resources (potentially including a local print replication requirement); 2) Article 17 which establishes a pre-production content review requirement that obliges film makers to notify the government of the title, story content, and production plan that would be especially burdensome for co-productions; 3) Articles 26-28 under which distributors are required to provide “fair and right” treatment to exhibitors and could be interpreted to mandate provision of prints to theaters on demand (a potential “must supply” obligation); and 4) Article 40 restricting foreign entities from engaging in film distribution, exhibition, export, and import businesses.

**Lift Prohibitions and Restrictions on Foreign Company Participation or Investment in Importation, Direct Distribution, Exhibition, or Retailing in Copyright Products in Indonesia:** Presidential Decree 118 of 2000 stipulates that all importation and distribution of films and video products is restricted to wholly-owned Indonesian companies. The specific sectors of the media business that the Indonesian government has excluded from foreign investment include radio and television broadcasting service providers, radio and television broadcasting

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<sup>16</sup>Ministry of Culture and Tourism (MOCT) Ministerial Decree No. 55, PM No. 55/PW.204/MKP/2008 on Utilisation of Domestic Film Technical Services in Making and Duplicating Activities of Local Film and Duplication of Imported Film (2008). The Decree was once again (for the fourth time) suspended, for one year, until January 1, 2014.

subscription service providers, print media information service providers, filmmaking businesses, film technical service providers, film export and import businesses, film distributors, and movie house operators and services. The motion picture and music sectors are particularly hard hit by this ban. 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, music, and other copyright materials.

## **COPYRIGHT LAW AND RELATED ISSUES**

Copyright protection in Indonesia is governed by the Law of the Republic of Indonesia, Number 19 Year 2002 Regarding Copyright (effective July 29, 2003).<sup>17</sup> Indonesia joined the WIPO Copyright Treaty (WCT) on June 5, 1997 (in force March 6, 2002) and the WIPO Performances and Phonograms Treaty (WPPT) on February 15, 2005.

**2012 Copyright Bill:** The Indonesian government has drafted the “Bill of the Republic of Indonesia Concerning Copyright 10 October 2012” (“2012 Copyright Bill” or “Bill”), which is intended to modernize Indonesia’s copyright law and fully implement Indonesia’s treaty obligations. The government is commended for having made this draft available for review and comments, although we note that there may be an even more recent draft to which we are not privy. The following are some preliminary and non-exhaustive comments of the IIPA on the version of the 2012 Copyright Bill that we have reviewed:

**Technological Protection Measures (TPMs):** Draft Article 48 of the Bill provides a rudimentary approach to protection against unlawful circumvention of technological protection measures (called “Technological control measures” in the translation we possess) used by copyright owners to protect their works or objects of related rights. Article 48, like the current law, does not provide a sufficient scope of TPM protections. For example:

- “Technological control measures” are undefined, and it is unclear whether “used for the protection of Works or Related Rights” would cover all access controls as well as copy controls. “Technological control measures” should be defined as any technology, device, or component that controls access to Works or Related Rights, or protects exercise of any right in Works or Related Rights as provided by this Law.”
- Trafficking in circumvention devices, technologies, components, or services is not expressly covered. The law should make it illegal for anyone to “manufacture, import, export, distribute, offer to the public, otherwise traffic in circumvention technologies, products, or components.”
- The phrase “other causes permitted by the prevailing laws and regulations” in Draft Article 48 should be deleted, leaving a finite enumerated list of cases in which the act of circumvention of a TCM is permitted.
- The Bill also fails to criminalize violations of Article 48 on circumvention of “technological control measures.” This should be remedied as well.

**Chapter VIII (Draft Articles 50-52) on Internet Infringements:** IIPA is generally supportive of the approach taken in the Draft, which creates a notification system to the Minister of Information regarding Internet infringements which then determines whether such infringements will be taken down or access to them disabled. In these draft articles, much will depend on the meaning of “sufficient evidence.” IIPA believes this approach undertaken by the Indonesian government in the Bill should be made in conjunction with a more common ISP notice and takedown system and taking steps to encourage the active cooperation of ISPs with right holders to prevent the use

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<sup>17</sup>*Undang-Undang RI No. 19 Thn 2002 Tentang Hak Cipta.* In addition, the Indonesia government also points to a *Fatwa* indicating that infringement is forbidden by Islamic law. The Indonesian Ulema Council (*Majelis Ulama Indonesia/MUI*) has released a religious decree (*fatwa*) emphasizing that —any kind of IPR infringement, including but not limited to, using, disclosing, producing, utilizing, selling, importing, exporting, distributing, giving out, providing, publishing, reproducing, copying, counterfeiting, and hijacking others’ IPR illegally is *haram*, or legally forbidden by Islamic law. (MUI Decree No. 1/MUNAS VII/MUI/15/2005 concerning IP Protection).

of networks for the commission of infringing acts, including but not limited to establishing fair and effective processes for dealing with repeat infringers.

**Landlord Liability:** The piracy situation in Indonesia could be alleviated somewhat by establishing landlord liability, so that mall owners would no longer be able to ignore or avoid information about piracy activities occurring on their premises and for which they are receiving a financial benefit. A basis for such liability already exists in the Civil Code. Namely, a landlord's acts of contributing to infringement may be considered as an "unlawful act" under Article 1365 of the Civil Code. In addition, Article 1366 of the Civil Code creates liability for illegalities caused by omission to act and imprudence (so potentially allows liability for landlords who know or should know about infringing activities). Article 1367 of the Code covers damage caused by acts of persons under one's responsibility or supervision, which again, could be a landlord's tenants. However, liability may be avoided if the party can prove that they have taken necessary steps to prevent it and the current act could not be prevented by them. IIPA proposes that the drafters clarify landlord liability in the 2012 Copyright Bill. An example of draft language to accomplish this follows:

"In accordance with Articles 1365, 2366 and 1367 of the Civil Code, anyone who deliberately provides an opportunity, means or information for any civil act of copyright infringement may also be liable for the act itself, including landlords who, knowingly or with constructive knowledge, allow infringing acts to be committed on their premises and fail to take steps to prevent such acts, such as immediately terminating the tenancy."

**Aiding and Abetting:** Similar to landlord liability, there is no clear provision on aiding and abetting with respect to criminal copyright infringements in the 2012 Copyright Bill. The concept of aiding and abetting can be found in Indonesia's Criminal Code, Articles 55 and 56. Those Articles mention participation in punishable acts, namely, anybody who with others deliberately provides an opportunity, means or information for the commission of a crime may also be liable for the act itself. Aiding and abetting liability should be brought into the Bill, including landlord liability. An example of draft language to accomplish this follows:

"In accordance with Article 55 and 56 of the Criminal Code, anyone who deliberately provides an opportunity, means or information for the commission of a crime may also be liable for the act itself, including landlords who, knowingly or with constructive knowledge, allow criminal acts to be committed on their premises and fail to take steps to prevent such acts, such as immediately terminating the tenancy."

**Minimum Criminal Penalties, Including Against Unlawful Circumvention of TPMs:** The criminal provisions in the 2012 Copyright Bill have unfortunately taken a major step backward from the current law, in that they no longer would provide for minimum criminal penalties. While the increase in the maximum fine in Draft Article 107 to 500 billion Rp. is helpful (US\$51,550), without a minimum fine, deterrent sentences will not be forthcoming. IIPA recommends a statutory minimum fine for copyright matters of 10,000,000 Rp. (US\$1,030) and recommends that judges take into account the economic seriousness of copyright crimes and ensure that penalties are deterrent. The maximum should be applied to Articles 106, 108, 111, 112, and 116. In addition, the minimum prison sentence (which under the current law is one month under Article 72(1)) should be restored, e.g., in Articles 106, 107, 108, 111, 112, and 116.

**Ex Officio Criminal Authority:** The Bill bifurcates the criminal offenses into those considered to be complaint-based, and those which do not require a complaint. The former category includes offenses involving moral rights and offenses involving the tampering with rights management information. All other copyright offenses would remain general crimes, meaning they are not complaint-based, and authorities can continue to act *ex officio*. We also note that Article 48 violations are not subject to criminal remedies under the Bill. This should be fixed in the next iteration, and such offenses should not be complaint-based.

**Coverage of End-User Piracy of Software and Hard Disk Loading:** IIPA appreciates coverage of commercial reproduction of computer programs in Draft Article 8(3) and believes this covers most forms of end-user piracy and hard disk loading. To ensure full coverage, IIPA recommends adding after the phrase “may not” the words “upload, store, or” before the word “reproduce.” It would also be important to clarify that “commercial purposes” would include an unfair commercial advantage such as that enjoyed by a person or enterprise that uses software without paying for it to produce other goods and services. This could be accomplished through explanatory notes.

**Ex Parte Civil Searches:** The TRIPS Agreement requires Indonesia to have available the possibility of *ex parte* relief (“Anton Pillar” orders). Preliminary injunctions are provided for through Draft Articles 100-103 and the related government regulation enacted in 2012. Anton Pillar orders appear to be provided for in Draft Article 100, but the government should clarify that the “provisional decision” can be made on an *ex parte* basis. Unfortunately, the procedures for obtaining a preliminary injunction or “Anton Pillar” order, particularly, those set out in Draft Articles 102 and 103 are too prescriptive, and contain timeframes that are too tight and conflict with other legal rules, e.g., requiring legalized documents and evidence from abroad. The TRIPS Agreement requires that procedures concerning the enforcement of intellectual property rights “shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.” For example, the bond set out in Article 101(e) is too high, and along with the forfeiture provision in Draft Article 103(5), cannot pass the TRIPS test. Other provisions are unclear. For example, Draft Article 103(4)(c) enables reporting of injunctions to the police or PPNS officers at the IPO. It is unclear how this will work in practice.

**Internet Exception:** Draft Article 39(d) of the Draft allows “making and dissemination” of Internet content on two conditions: 1) that it is “for non commercial and or not profitable to the Author” or 2) the Author declared having no objection to such making or dissemination.” This provision raises serious concerns. “Making and dissemination” of content even for “non commercial” or “not profitable” uses will conflict with a normal exploitation of the work and is not in compliance with Indonesia’s international obligations. Draft Article 39(d) should be deleted.

**Compensatory Damages and Statutory Damages:** Draft Article 92 (*et seq.*) of the Bill deals with claims for compensatory damages arising out of copyright infringement cases. Unfortunately, as is well known from experience of the industry, the costs of bringing civil cases usually far outweighs any damages recovery. Indonesia must ensure the Bill meets its international obligations to provide for “damages adequate to compensate for the injury the right holder has suffered because of an infringement” and “expenses, which may include appropriate attorney’s fees.” It is also understood that in appropriate cases, “recovery of profits and/or payment of pre-established damages” should be available on the basis of strict liability. IIPA proposes that “compensation” be further defined, perhaps in Article 1. An example of draft language to accomplish this follows:

“Compensation may include material damages such as the lost profits of the copyright or related rights holder or the profits earner by the infringer. The profits of the infringer may be calculated either by reference to the equivalent profits of the copyright or related rights holder or by providing expert financial evidence for that industry. Compensation may also include immaterial damages such as harm to reputation or other intangible losses.”

IIPA also recommends a provision on statutory damages. An example of draft language to accomplish this follows:

“In the absence of clear information relating to the income derived from the infringement, a judge may award a minimum statutory compensation of at least Rp100.000.000,00 (one hundred million Rupiah) per infringement.”

**Work for Hire:** Draft Article 32(3) reverses the ordinary work for hire presumption which would provide that when a work is made by an employee in the context of employment, the employer should be deemed the author and copyright holder, unless otherwise agreed. Since Draft Article 32(3) may pose certain conflicts with regard to other

Draft Articles and sub-sections, we urge the drafters to reverse the effect of this provision, by deleting “party making such work” and replacing it with “employer.”

**Over Broad Exception for “Use, Taking or Reproduction and change of a Work”:** Draft Article 40(1) of the Bill represents an overly broad exception that cannot pass muster under international treaties to which Indonesia is a party. While the exception in 40(1)(a) enumerates the second part of the three-step test as a safeguard, this provision remains objectionable since “use, taking or reproduction and change” of a work “in whole” or even “in part” will conflict with a normal exploitation of the work. The provision is not limited to published materials. This provision should be revised, and we recommend referencing Article 15 of the current law for guidance.

**Exception for “Research and Computer Program Development”:** Draft Article 41(1) sets out an exception for “research and Computer Program development” that is too broad. To the extent the purpose of “research” is to observe, study, or test the functioning of the computer program, that may be acceptable. However, “Computer Program development” would be too broad as is. If the drafters wish to retain “Computer Program development,” it should meet the requirements of the three-step test and be in keeping with existing norms on the subject, e.g., the stricter standards of Article 6 of the European Directive on the legal protection of computer programs, Directive 2009/24/EC of 23 April 2009. Without those safeguards, and without assurances that “Computer Program development” will not unreasonably prejudice the right holder’s legitimate interests or conflict with a normal exploitation of the computer program and otherwise will not harm the commercial interest of the author or copyright holder, including but not limited to the confidential nature of the source code and/or technological control measures, the exception for “Computer Program development” should be deleted.

**License Agreement Recordal – Prohibited Formality:** Draft Article 78(3), in deeming that a license agreement “shall have no legal effects on the third party,” has created a prohibited formality which is in violation of the Berne Convention. Linking Draft Article 77 criteria to the ability to record in Draft Article 78(2) only compounds this problem.

**Compulsory Licenses Not Berne-Compatible:** The Berne Convention allows for compulsory licensing in only extremely narrow circumstances. The compulsory licenses set out in the 2012 Copyright Bill do not meet the Berne criteria. The Article 79 compulsory license, for example, must be limited to works “published in printed or analogous forms of reproduction” to be consistent with the Berne Convention Appendix. The provisions that follow must then meet all the stringent requirements of the Berne Convention Appendix.

**Registration and Invalidity:** IIPA understands from local right holders that there is considerable concern about abuse of the voluntary copyright registration process in Indonesia. While a voluntary registration system is Berne-compatible, we understand that in Indonesia, many invalid copyrights get registered, including by IP infringers, because there is no examination process. Revocation of invalid copyright registrations is both expensive and involves time consuming litigation. Draft Article 67 provides a safeguard against false registration, namely, there is no presumption of the truth of the subject matter contained in the application or registration. In addition, Draft Article 89 provides for invalidity of registrations. However, given the abusive practices of infringers obtaining false registrations, we believe Draft Article 89 should be modified to authorize DGIPR to review and invalidate false applications or registrations. In addition, we suggest creating a more forceful deterrent, including fines and penalties, against anyone who knowingly files a false application.

**Other Problems with Registration System in Indonesia:** According to Draft Articles 71 and 73 of the Draft, registration creates an obligation to record transfers and other changes which are not otherwise required for unregistered copyright works. To the extent failure to record transfers or other changes would deny copyright protection to the registrant, this could constitute a prohibited formality under the Berne Convention and should be deleted.

**Complaint Procedures (Draft Articles 93-99):** IIPA recommends removing the articles related to “Complaint Procedure” from the Bill and having them separately issued as detailed rules of court procedure. The

timeframes set out in these Articles are too inflexible for a statute and create practical problems for litigants. The TRIPS Agreement requires that procedures concerning the enforcement of intellectual property rights “shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.”

**Civil Court Orders:** Draft Article 92 makes no mention of civil court orders. IIPA proposes that language equivalent to the criminal provisions in article 120, covering the seizure and destruction of infringing goods, items and the tools for their production, be included in this civil provision.

**Rights Management Information:** The 2012 Copyright Bill applies provisions related to rights management information only to moral rights. Draft Articles 5 and 6 on RMI should be expanded to cover all copyright in order to meet the requirements of the WCT and WPPT. To accomplish this, IIPA proposes changing “the moral rights as described in Article 4 paragraph (1)” to “copyright and related rights under this law.” In addition, Draft Article 6(3) should be expanded to prohibit trafficking in RMI. To accomplish this, IIPA proposes adding to Draft Article 6(3) the following:

“It shall also be prohibited to distribute or import for distribution rights management information knowing that it has been altered without authority, or distribute, import for distribution, broadcast, communicate or make available to the public copies of works, knowing that rights management information has been removed or altered without authority.”

**Restriction on Ability to Contract:** Draft Article 77 sets forth some general principles about licenses involving copyright. Based on the way they are written, and depending on how they are interpreted and/or implemented, they may constitute unreasonable restraints on the ability of parties to freely contract. For example, Draft Article 77(1) prohibits license agreements that “cause detrimental effect on the economy of Indonesia.” Draft Article 77(2) prohibits any clauses “which may cause detrimental effects on the parties” or contain clauses “causing unhealthy business competition.”

**Collective Management Restriction:** The Bill contemplates the establishment of collective management organizations (many of which now exist in Indonesia). The Bill would limit the number of CMA’s to be established. Draft Article 82(3) indicates the public may “only set up one (1) Collective Management Association by the type of Work or Related Rights.” It at least appears that the government has, through this proposal, scrapped its plan to mandate collective licensing across copyright categories, and set a joint tariff rate through the establishment of a “National Collective Management Organization,” which is a positive development.<sup>18</sup> Of course, it must be ensured that such CMAs are voluntary and not mandated for any author or right holder. The existing language under Article 82(3), which seems to suggest that the categorization is based on “type of Work or Related Right,” may create problems for some industries. For example, music videos owned by record companies may be deemed administered by the CMA for “cinematographic works.” To avoid this problem, it is suggested that the text in Article 82(3) should be amended so that each type of work or object of related rights should be permitted its own CMA.<sup>19</sup>

Furthermore, the only recourse to change or remove a poorly performing CMA under the Draft Bill is to request the Minister to exercise his discretion to revoke the operational permit upon the non-compliance of the three conditions set out in draft Article 85(2). There should be a mechanism in place to enable right holders on their own

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<sup>18</sup>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.

<sup>19</sup>So, for example, to ensure that “music video” is not considered part of “cinematographic works,” Article 82(3) might provide that the one voluntary CMA can be set up by the “type of work or object of related rights.”

initiative to request the revocation of the operation permit of the CMA, which should not be limited to the three conditions under draft Article 85(2). It should be noted the difficulty with this process, since the draft provides for only one CMA (per work or related right), meaning right holders cannot establish another CMA to create competition with the poorly performing CMA. Under draft Article 82(4), it is critical to maintain the voluntary nature of CMAs under the law in Indonesia. Draft Article 82(4), governing the payment of royalty by users, seems to suggest that once users make payments to right holders directly or via the CMA, they have met the requirements for use. The draft is silent as to whether the CMA must have been voluntarily chosen by the particular right holder to collect on their behalf. The law should clarify (directly in the Draft Bill or in implementing regulations) that the CMA may only act on behalf of the right holders if the right holder has granted authorization to collect on its behalf to the CMA.

**Right Owners Should Retain Freedom to Make Commercial Decisions With Their Licensees:** Article 75(5) provides that “the amount of royalty ... and the procedure of granting thereof shall be made with due observance of the applicable normal practice.” Article 75(6) states that “at the request of the parties, the Minister may determine the amount of royalty if the parties deem the applicable normal practice as described in paragraph (5) not to meet justice.” First, “normal practice” should be understood as the price reasonably related to that normally charged in the country for the use of the work or object of related rights. Second, it seems, but is not entirely clear, that both parties must request the Minister for such a determination. This is extremely important, since otherwise, it could amount to a statutorily-mandated royalty, and would stifle free business negotiations between right owners and their licensees in the future. For clarity’s sake, it is suggested that Article 75(6) be deleted from the draft.

**Definition of Computer Program:** IIPA recommends deleting “to make the computer work and serve its certain functions or achieve certain results” from the definition of “computer program” in Draft Article 1. Computer programs must be protected as literary works under the Berne Convention regardless of their quality or their ability to achieve certain results. The change ensures full compliance and follows the modern trend not to equate a computer program with its “functions” or “results.”

**Broadcast Exception:** Draft Article 47 sets out what appears to be a reduction of Berne Article 10*bis*. By including “communication” and the phrase “other facilities” the provision may run afoul of the Berne strictures.

**Censorship Provision Should be Removed from Bill:** Draft Article 115 does not relate to copyright and should be removed from the Bill.

**Omission of Anti-Camcording Piracy Provisions:** The 2012 Copyright Bill does not, but should, define the act of using (or attempting to use) an audiovisual recording device in cinemas to camcord, record, or transmit a film, in whole or in part, as a *strict liability* criminal offense. The APEC Ministers and Leaders, including from Indonesia, recently agreed on “Effective Practices for Addressing Unauthorized Camcording,” and the steps recommended therein should also be taken.<sup>20</sup>

**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).

**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

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<sup>20</sup>Effective Practices for Addressing Unauthorized Camcording, 2011/AMM/014app05, 23<sup>rd</sup> APEC Ministerial Meeting, Hawaii, United States 11 November 2011. The document notes,

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

copyright infringement is included as a predicate crime for remedies under its organized crime law, e.g., as grounds for broader criminal investigations, seizure, freezing of assets, etc.

**Optical Disc Regulations Should be Strengthened and Made GATT/WTO-Consistent:** The Optical Disc Regulation (2005),<sup>21</sup> a Ministry of Trade Regulation on the import of machines and raw materials,<sup>22</sup> and another Regulation on reporting by registered producers,<sup>23</sup> were enacted and issued to address rampant optical disc piracy. The Regulations need to be updated to: 1) prohibit the unlawful use of or manipulation of SID code, including gouging off SID Codes and/or total non-use of SID codes; 2) provide for centralized licensing of production of prerecorded or blank optical discs; 3) remove the requirement that imported, pre-recorded discs be marked with identification code, which violates GATT/WTO rules and could have other negative ramifications; 4) adequately cover stampers and masters; 5) expressly cover (imports and) exports of discs, equipment and raw materials; 6) expressly authorize entry in an inspection in case a suspect target refuses entry (and penalties for such refusal); 7) require the government to keep records of “permits” and raids run; 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 Indonesian government 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.<sup>24</sup> 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**

In December 2011, IIPA submitted a petition to have the GSP status of Indonesia reviewed with respect to eligibility criteria listed in subsections 502(b) or 502(c) of the 1974 Act (19 U.S.C. 2462(b) and (c)).<sup>25</sup> See 64 Fed. Reg. 20047. In particular, among the criteria the President must take into account in determining whether a country should continue to be designated as a GSP beneficiary country are “the extent to which such country is providing adequate and effective protection of intellectual property rights,” and “the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets ... of such country.” 19 USC 2462(c)(4) and (5). In 2011, Indonesia exported goods valued at \$1.96 billion to the U.S. receiving preferential duty-free treatment under the GSP Program, representing 10.3% of its total exports to the U.S., according to U.S. government statistics. In the first eleven months of 2012, Indonesia exported goods valued at almost \$2.04 billion to the U.S. receiving preferential duty-free treatment under the GSP Program, representing more than 12.3% of its total exports to the U.S., according to U.S. government statistics. IIPA believes the Indonesian government is not meeting the eligibility criteria due to: 1) lack of adequate and effective intellectual property rights protection and enforcement which has resulted in high, in some cases extremely high, levels of physical and online piracy; and 2) lack of equitable and reasonable access to the Indonesian market, through many statutory or, in some cases, in-practice barriers, including barriers imposed on the motion picture industry.

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<sup>21</sup>Government 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.

<sup>22</sup>Regulation 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.

<sup>23</sup>Ministerial Decree of the Minister of Trade and Industry of Republic of Indonesia, Number 648/Mpp/Kep/10/2004 (October 18, 2004), Regarding Reporting and Monitoring of Optical Disc Industrial Company.

<sup>24</sup>The 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.”

<sup>25</sup>International Intellectual Property Alliance, *Request for Review of the Intellectual Property Rights Practices of Indonesia in the 2011 Annual GSP Country Practices Review*, 76 Fed. Reg. 67531 (November 1, 2011); 76 Fed. Reg. 76477 (December 7, 2011) (extending deadline to December 30, 2011), Docket No. USTR-2011-0015, December 30, 2011, at [http://www.iipa.com/pdf/2011\\_Dec30\\_Indonesia\\_GSP\\_Submission.pdf](http://www.iipa.com/pdf/2011_Dec30_Indonesia_GSP_Submission.pdf).

On July 12, 2012, the United States Trade Representative announced the results of the 2011 annual GSP review, indicating that it had “accepted for review” a country practice petition on Indonesia regarding intellectual property rights.<sup>26</sup> IIPA then filed its request to appear at the GSP hearing which was held on October 2, 2012.<sup>27</sup> 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. IIPA looks forward to continuing engagement with the U.S. government as it deliberates on IIPA’s GSP petition regarding Indonesia.

## **OTHER U.S. ENGAGEMENT**

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.<sup>28</sup> We understand that Indonesia’s Minister of Trade is at least looking into the possibility of the Trans-Pacific Partnership for the country, but has not fully studied it or made any decision at this stage.<sup>29</sup> Indonesia’s eventual participation in the TPP could foster improvements in the IP climate in the country and aid in the elimination of discriminatory barriers described in this report.

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<sup>26</sup>See Office of the United States Trade Representative, *Generalized System of Preferences (GSP): Results of the 2011 Annual GSP Review; Notice of Hearing and Public Comments for Country Practice Petitions Accepted as Part of the 2011 Annual GSP Review*, July 12, 2012, at <http://www.gpo.gov/fdsys/pkg/FR-2012-07-12/pdf/2012-17023.pdf>.

<sup>27</sup>International Intellectual Property Alliance, *Pre-Hearing Brief, and Request to Appear at the Public Hearing on Indonesia, Regarding Generalized System of Preferences (GSP): Results of the 2011 Annual GSP Review; Notice of Hearing and Public Comments for Country Practice Petitions Accepted as Part of the 2011 Annual GSP Review*, 77 FR 41209 (July 12, 2012) (dates revised in 77 FR 49476 (August 16, 2012)), September 18, 2012, at [http://www.iipa.com/pdf/2012\\_Sep18\\_Indonesia\\_GSP\\_Pre-Hearing\\_Brief\\_Request\\_to\\_Appear.pdf](http://www.iipa.com/pdf/2012_Sep18_Indonesia_GSP_Pre-Hearing_Brief_Request_to_Appear.pdf).

<sup>28</sup>The “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 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.

<sup>29</sup>*Minister: No Decision on Trans Pacific Partnership Yet*, Republika Online, January 31, 2013, at <http://www.republika.co.id/berita/en/jakarta-region-others/13/01/31/mhmmzw-minister-no-decision-on-trans-pacific-partnership-yet>.

# RUSSIAN FEDERATION

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that the Russian Federation be retained on the Priority Watch List in 2013.<sup>1</sup>

**Priority Recommendations in Russia – Key Legal Reform and Enforcement Actions:** Here is a list of IPR legal reform and enforcement priorities that IIPA recommends to the Government of Russia for 2013:

- Undertake effective actions against Internet piracy – including:
  - (a) stopping the infringement that occurs via unlicensed streaming services including those incorporated into social networks, as well as actions against pay-per-download websites and against cyberlockers, BitTorrent sites, and Internet cafes, with criminal and/or administrative actions commenced (and deterrent penalties) against owners and operators of such sites, regardless of whether the servers are located in Russia or elsewhere. This includes actions against commercial enterprises that provide services with the clear intent to promote or induce infringement, such as vKontakte’s music service (which consists predominantly of infringing material); and
  - (b) properly staffing and resourcing of Internet enforcement units in the Ministry of Internal Affairs (MVD), and in the various police enforcement agencies (including a sub-unit within Department K).
- Amend the Civil Code, Part IV, to:
  - (a) fully implement the WIPO digital treaties – the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT);
  - (b) clarify (or confirm, if existing) the illegality of providing services that are inducing or encouraging the infringement of copyright and related rights, or that facilitate infringement and do not take reasonable steps to prevent it (i.e., providing a clear basis for liability for such service providers);
  - (c) implement notice and takedown procedures to ensure that websites hosting illegal material take expeditious action to remove links to, or copies of, infringing material. Such procedures should be efficient, scalable (e.g., capable of being fully automated), and likely to result in the permanent removal of links to, or copies of, infringing material;
  - (d) provide legal norms that create incentives for Internet Service Providers (ISPs) to cooperate with right holders in fighting infringement taking place over their networks or platforms through the adoption and implementation of effective business practices that address infringement;
  - (e) introduce a duty on ISPs to provide information to law enforcement agencies and rights holders; and, ensure that injunctions are available against ISPs and other services;

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<sup>1</sup>For more details on Russia’s Special 301 history, see IIPA’s “History” appendix to this filing at <http://www.iipa.com/pdf/2013SPEC301HISTORICALCHART.pdf>, as well as the previous years’ reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA’s 2013 global issues, see our cover letter at <http://www.iipa.com/pdf/2013SPEC301COVERLETTER.pdf>.



(f) implement effective measures to address websites that are hosted outside of the jurisdiction of Russia or where the domain owner and/or website administrator are foreign entities, or where the website is registered outside of Russia, and, establish liability for domain name owners and/or website administrators regardless of the location of the servers; and

(g) ensure that an unauthorized online distribution, communication or making available is considered an act of infringement, regardless of whether it is undertaken for profit-making purposes or other commercial benefit or advantage.

- Strengthen copyright liability under the Administrative Code by:
  - (a) eliminating the for-profit requirement in Article 7.12 of the Code of Administrative Offences, and raising administrative penalties to deterrent levels, for example, by implementing: (i) higher fixed fines for violations by legal entities and individuals; (ii) fines proportionate to corporate revenues (e.g., as is done for anti-monopoly violations); or (iii) penalties to disqualify, for one to three years, managers of legal entities.
  - (b) ensuring that the Federal Anti-Monopoly Control uses its enforcement authority to take effective administrative actions against services that distribute protected materials without the proper authority to do so, such as, vKontakte and odnoklassniki.ru; and
  - (c) establishing a police unit with clear responsibility to conduct administrative IPR enforcement or prioritize this task for Department K (and properly training and resourcing that police unit).
- Increase the overall number of criminal IPR cases to previous levels, and bring deterrent levels of criminal actions against retail chains that sell pirated entertainment software, movies and music, businesses using unlicensed software, and organized criminal syndicates involved in piracy.
- Ensure that state approved monopolies for the collective administration of certain rights operate in a fair and transparent manner based on principles of accountability and fair governance, and that copyright owners maintain the right to exercise their rights with respect to Internet distribution as they deem appropriate, free from compulsory licensing or other limitations on the free exercise of rights.
- Amend the Criminal Code and undertake effective enforcement against illegal camcording of motion pictures.
- Ensure government agencies and state owned enterprises procure and use only legal software.
- Establish a uniform methodology for the Russian enforcement agencies on the investigation and prosecution of copyright and related rights infringements to ensure that prosecutors can properly investigate administrative and criminal actions, and to ensure a consistent and uniform approach to these cases throughout the country (particularly, for Internet and software enterprise end-user cases). Prepare and adopt judicial guidelines for civil search procedures (consistent with WTO TRIPS Agreement), and the retention of evidence (after raids) for civil and arbitration proceedings.
- Amend the Criminal Code to establish criminal liability against legal entities, including for IPR crimes.

**Executive Summary of IPR Issues:** In 2012, Russia completed its accession to the World Trade Organization. It is now obligated to be in full compliance with the WTO TRIPS Agreement, along with the detailed additional obligations spelled out in the Working Party Report. In addition, in December 2012, the U.S. and Russian governments completed a detailed IPR Action Plan which sets out a number of important enforcement and legal reform priorities for Russian IPR enforcement, which, if properly and fully implemented, should significantly improve copyright protection and enforcement in Russia. These two important steps undertaken in 2012, if fully implemented,

provide an historic opportunity for the Government of Russia to make great progress in improving copyright protection and enforcement. Although Russia has made a number of important IPR legal reforms over the past several years for WTO accession and in order to comply with its other multilateral and (U.S.) bilateral IPR commitments, there remain many critical steps for full treaty and trade agreement compliance, and most importantly, to effectively and immediately address digital piracy in Russia.

Despite the accession to the WTO and the signing of the U.S.-Russia IPR Action Plan, 2012 was a year where little concrete progress was made in Russia on either legal reforms or, more importantly, enforcement. Russian authorities failed to effectively address the very serious threat of Internet and other digital forms of piracy. The number of criminal raids and police activity in general, declined significantly in 2012 from previous years. Following legislation passed in 2011, there was a major reorganization of the police force and a drop in resources (there are about half the number of IPR economic crime police as there were a few years ago), and not coincidentally, in 2012, the initiation of criminal IPR cases is at about half its level from five years ago. Most tellingly (according to the information available to us), there was not a single Internet piracy criminal case commenced in Russia in 2012. Additionally, there were too few administrative actions or deterrent level administrative penalties against commercial enterprises that use or operate as distribution hubs for infringing content. To curb piracy, the Government of Russia needs to pursue more, and more effective criminal and administrative actions, and strengthen administrative penalties, particularly against large-scale enterprises, and law enforcement agencies should seek, and judges should administer, deterrent criminal penalties.

For the past several years, the business software industry has been the only copyright industry that has seen a positive trend in piracy rates in Russia. Software industry piracy rates declined significantly in the past several years (a 10% drop from 2007 to the current rate of 63% in 2011),<sup>2</sup> due to criminal and civil enforcement efforts directed against end-user software piracy and progress made on legalization of software purchased by the government. However, this progress is likely to stall unless Russian authorities reverse the significant decline in enforcement activity by Russian enforcement authorities and recommit to ensuring legal software use in government institutions and state owned enterprises.

Hard goods piracy remains a serious concern for some industries even though Russia's laws are generally adequate for addressing this problem (although some gaps remain). But it is the online piracy situation where Russia's legal regime is wholly inadequate and in need of modernization. There are important legal reforms needed to move forward – as detailed above. And, the Russian legal regime must avoid backsliding. For example, last year there were efforts to amend the copyright law to clearly exempt from copyright liability all third parties – including hosting providers and service providers who openly encourage infringement, and to excuse almost all online infringing activity as “private” copying. Had these provisions been adopted, the Russian legal regime would have taken a step even further backward in its ability to address its serious digital piracy problem.

The music industry is particularly concerned about the continued operation of infringing music services, such as the one operated by vKontakte (still operating despite several Russian court rulings against it). In December 2012, vKontakte was listed by the U.S. Government as one of thirty Special 301 Out-of-Cycle Review of Notorious Markets because of its ongoing illegal activity. Peer-to-peer piracy is a major concern in Russia, as it is globally, although it is presently dwarfed by the problems associated with hosted content at sites such as vKontakte, and at

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<sup>2</sup>BSA | The Software Alliance's 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Russia was 63%, representing a commercial value of unlicensed software of US\$3.23 billion. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA's 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>

Russia's second largest social network site, [odnoklassniki.ru](http://odnoklassniki.ru), which also operates an unlicensed music service. Those two and the many other illegal music services noted in this filing, combine to prevent the development of a legitimate online market place. The music industry is also concerned with the lack of transparency and governance issues in connection with the state accredited collecting societies for authors, record labels and performers, including VOIS, and calls upon the Government of Russia to use its oversight authority to ensure that right holders are being fairly represented and treated, in accordance with commitments that it made to the U.S. Government and other of Russia's trading partners who had expressed concern with the accreditation process. Fair representation in these societies includes direct representation on the board in a manner that is proportionate to market share (and that reflects commercial realities). During WTO accession (in the Working Party Report, paragraph 1218), Russia assured its trading partners it would "review its system of collective management of rights in order to eliminate non-contractual management of rights within five years after Part IV of the Civil Code entered into effect" (in 2008); so, that is an obligation for 2013 – to bring the management societies in line with international standards on governance, transparency and accountability.

Book publishers are also concerned by the prevalence of online piracy in Russia, particularly on hosted-content sites such as [pdfchm.com](http://pdfchm.com), and note very low compliance rates in response to rights holder requests to takedown links to infringing content this past year. Peer-to-peer piracy continues to be an issue, with sites such as [rutracker.org](http://rutracker.org) providing free unauthorized access to e-books. Publishers and other rights holders still find a number of phishing sites hosted in Russia purporting to offer instant downloads of free e-books, as well as other copyrighted content, for a minimal membership fee. Customers providing credit card information do not actually get any files, but do incur unauthorized charges on their credit cards. In addition, Russia continues to have a very serious camcording problem, one of the worst in the world, affecting worldwide markets.

Russia is a beneficiary of the Generalized System of Preferences (GSP) program. One key factor in determining eligibility for GSP benefits is whether a country is providing adequate and effective protection of intellectual property rights. In the first eleven months of 2012, more than US\$522.1 million in imports to the U.S. from Russia enjoyed duty-free treatment under the GSP program (and more than US\$574.8 million in 2011).

## **COPYRIGHT ENFORCEMENT IN RUSSIA**

**Internet Piracy Enforcement:** Russia has one of the largest and most active online communities in Europe. Internet and wireless access by Russian citizens is growing rapidly; according to the ITU, as of June 2012, almost 49% of the Russian population now has Internet access, up from 43% just a year earlier. Yet, basic copyright enforcement of Internet piracy has lagged far behind the rapid growth of Internet and wireless access in Russia.

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

Government of Russia, has to date, taken few of these steps. The success of Russia's WTO accession, and the Action Plan, will be measured by how it implements the many pledges and commitments it has made, especially those directed against Internet piracy.

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

In addition, prosecutors should coordinate their efforts with the police, as should the Investigative Committee of Russia, the Investigative Department of MVD, the Federal Security Service of the Russian Federation (FSB), and Customs, now that they all can initiate criminal cases. Beginning in 2011, the General Prosecutor's Office can supervise, but not initiate, criminal cases. One recommendation is that the General Prosecutor's Office, the Investigative Committee of Russia, and the Investigative Department of MVD develop an updated and detailed methodology for investigations of copyright infringements which would help to increase the quality, effectiveness and consistency of IPR enforcement activities (work on a draft methodology was indefinitely suspended two years ago).

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

In addition to the pay-per-download and other hosted sites, Russia is home to a number of major BitTorrent indexing sites such as rutracker.org, launched in response to the takedown of torrent.ru. Rutracker.org has an estimated four million users and a worldwide Alexa website ranking of 248; it is also one of the thirty "Notorious Markets" named by the U.S. Government in December 2012 for its blatant online piracy. One particularly problematic site is GameTorrent, a BitTorrent tracker and online pirate discussion forum that is owned by a Russian national, but currently hosted in Estonia; neither ISPs nor website owners respond to takedown requests for this site. In 2012, Russia was first in the world in the number of connections by peers participating in the unauthorized file sharing of select Entertainment Software Association (ESA) member titles on public peer-to-peer networks – a dramatic increase from its tenth place ranking in 2010 (and fourth place in 2011). ESA also reports that Russian service providers either host or provide proxy services to a number of the world's largest and most popular linking sites, including warez-bb.org, final4ever.com and the warezscene.org.

Russia is also home to the world's two most prolific criminal release groups. The pirates obtain their source infringing copies by camcording films from local theater screens and then uploading these illegal camcords onto the Internet (and sell hard copies as well). Pre-release DVDs of major film titles often appear on the Internet (and then in pirate hard copies sold online or in markets), within a few days after the authorized theatrical release. The illicit

camcords sourced from Russia are of exceptional quality and remain in high demand by international criminal syndicates for Internet uploading.

vKontakte, the most popular online social network in Russia (over 140 million registered members worldwide and 39 million visits per day) is the largest single distributor of infringing music in Russia and also a hotbed for online piracy of movies and television programming, which is why it is on the U.S. Government's "Notorious Markets" list. It is also one of the largest illegal distributors of music in the world (and is listed as one of the top 40 most visited websites worldwide). It has a functionality specifically designed to enable members to upload music and video files, which includes hundreds of thousands of unlicensed copyright works (films and television programs) and recordings. It is available in many languages, including English, and has a dedicated content search engine that enables other members to search and instantly stream infringing content; plus, some third-party software developers have distributed "apps" to enable non-members to search, stream and download the content available on the site. While vKontakte will generally takedown specific content when notified, that is an inappropriate enforcement mechanism for a problem of vKontakte's own making. Although vKontakte has a dedicated music feature, it has no licenses to distribute musical content – it either must eliminate this service, or license it properly. In January 2012, Gala Records, a Russian record label, won several civil cases (including from the highest court) against vKontakte for copyright infringement, but very low remedies were awarded – (even though the Civil Code, Part IV, Article 1301 provides statutory damages of 10,000 to 5 million rubles, in the discretion of the court). Now that the Copyright Law has been interpreted to impose liability on vKontakte, enforcement authorities should use this decision as a springboard for criminal and/or deterrent administrative actions against not only vKontakte, but the many other Russian-based sites targeting users inside or outside of Russia (such as, fast-torrene.ru, my-hit.ru, okinj.tv, etc.).

The recording industry reports that paid download sites remain an important source of piracy in Russia along with the peer-to-peer services, and cyberlockers. Although the most notorious website, allofmp3.com, was taken down (in 2007), and has not resurfaced at that Internet address, there are now in excess of thirty copycat sites based on the same business model as the original allofmp3.com (which were also named to the Notorious Markets list by the U.S. Government in 2012). The user interface of these sites looks very professional and can easily deceive users into believing the sites are legal (they offer "give away" incentives to attract more users; some sell albums for as little as US\$1). Some of the sites use up to thirty different domain names (but the same user interface). These and other pay-per-download websites remain a problem for the music industry. The Russian Government should takedown the sites, and criminally prosecute the site operators. Other important pirate sites (that are not pay-per-download sites) include: zaycev.net, rutracker.org, best-mp3.ru, hotcharts.ru, musicstorm.org, muzoff.ru, primemusic.ru, poiskm.ru, mp3wall.ru, video.mail.ru, my.mail.ru, prostopleer.com, nnm.ru, rutor.org and tfile.ru (there are over 2,500 sites). In addition, in December 2012, the U.S. Government named two other Russian "Notorious Markets": one a linking site (warez-bb – registered in Sweden but hosted by a Russian ISP), and one cyberlocker (rapidgator.net – originally hosted in the United Kingdom, but now in Russia after U.K. officials shut it down).

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

independent production sector cannot easily shift to new business practices that might otherwise limit piracy. For example, worldwide same day release (referred to as “day-and-date” release) may prove an effective method to curb or delay piracy for the major studios, which control their own worldwide distribution, but for independents, whose national distributors release on their own schedule, this technique is impossible.

As noted, there was not one Internet criminal case commenced in Russia in 2012. There were some notable criminal enforcement cases in 2010 and 2011, but with mixed results: for example, in August 2010, Russian enforcement authorities commenced a case against filehoster.ru – an infringing cyberlocker and a BitTorrent site. However, following staffing changes at Department K, the investigation into that case ended. MPAA reports that in October 2011, a case against Interfilm.ru was reopened and the public prosecutor charged two of the administrators of Interfilm.ru under Article 146 of the Criminal Code; the case has been referred to the Timiryazevky District Court, where it is still pending. The prosecutor told the media, in announcing the case, that damages to the film industry were US\$1.24 billion. Also in 2011, MPAA reported that the Economic Crime Police and Department K raided Sib-Port.ru, confiscating equipment and arresting three of the site’s owners, but that case is also still pending.

BSA | The Software Alliance (BSA) reported only one raid against Internet users or services in 2012 (compared with 22 in 2011, 14 in 2010, and 25 in 2008), which did not result in the commencement of a criminal case (compared with 6 in 2011 and 15 in 2008), and thus, no convictions (there were three such convictions in each of 2011 and 2010).

To develop legal online music markets, the Government of Russia must resolve the issue of the state accreditation of collecting societies. IIPA remains very concerned with the lack of transparency and governance issues in connection with VOIS, the sole state accredited collecting body for record labels and performers. VOIS has not demonstrated compliance, thus far, with international standards in terms of accountability and transparency. In order for U.S. rights holders to be properly represented in Russia, and to establish legal digital music services, it is essential that VOIS operates in a transparent manner that reflects the interests of the broader community for which it is now responsible, requiring an integration of non-VOIS members into their governing bodies, and with reasonable agreements between the respective societies. The Government of Russia needs to act on this as it obligated itself to do in its international agreements (e.g., as specified in the Working Party Report, to be undertaken by 2013).

Overall responsiveness to takedown notices in Russia is mixed. Some ISPs cooperate and take down pirate materials once identified, but many ISPs are not willing to cooperate absent a court order, even with clear evidence of piracy. This is why ISP cooperation and clear third party liability, are essential. The motion picture industry reports that in 2012, most of the ISPs did generally cooperate and respond to RAPO cease and desist letters. There were attempts in 2012 by the Ministry of Economic Development to develop formal notice and takedown procedures between rights holders and ISPs, but those efforts were not successful.

**Criminal Enforcement in General:** For both digital and hard copy piracy, criminal enforcement in Russia remains a priority for IIPA and its members. Criminal enforcement by the government in 2012 was aimed at physical piracy; as already noted, there was not a single criminal case directed at digital piracy. IIPA recommends that Russian authorities step up their efforts to investigate Internet piracy of business software, entertainment software, books, music, and film material, by a variety of technical means, and increase the number and disposition of effective criminal investigators.

In 2012, the Russian police continued to take actions against copyright infringers, including against street vendor piracy and companies involved in the installation and use of pirated software. However, the overall number of raids, seizures, and especially criminal cases commenced, was down from the number of cases undertaken only a few years ago. As in recent years, there were some deterrent sentences and prison terms applied by the Russian courts, including a handful aimed at serious repeat offenders. Some copyright industries, such as the motion picture industry, have seen a decline of 5% to 10% in hard goods piracy in the past two years, in major cities, including Moscow, St. Petersburg, Rostov-on-Don, and Novosibirsk (and an overall decline in the size of the hard goods

market by about 50% since 2010). They also report continued cooperation by enforcement authorities with the Russian-Anti Piracy Organization (RAPO) in 2012.

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

All of the copyright industries reported substantial declines in the number of raids in 2012 from previous years, in part due to the severe cuts in police resources. In addition, the copyright industries are concerned that the proportion of raids to the initiation of cases, and to criminal verdicts, remains disproportionately low. The Government of Russia (MVD) usually provides comprehensive annual statistics on intellectual property cases, and investigations commenced; however, the full 2012 report was not available before the Special 301 filing deadline. From preliminary data, however, it is clear that criminal enforcement by the Government of Russia is down significantly, from prior years. According to the MVD statistics (through November), the number of criminal investigations was 3,455, less than half the (full year) statistics for 2007, when 7,874 investigations were commenced (there were 5,033 in 2011 and 6,118 in 2010).

BSA reported the overall number of raids decreased (as in prior years, the majority of raids are “channel” raids against CD sellers and pre-installed hard disk loaders). For example, there were 506 end-user raids in 2012 (down from 554 in 2011), and 931 “channel” case raids, down from 1161 in 2011. The number of criminal cases initiated did increase, although the number of court verdicts declined substantially. There were 97 criminal cases initiated against end-users in 2012, up from 63 in 2011, but down substantially from 200 in 2007 and 154 in 2008; there were 609 “channel” cases initiated in 2012, up from 427 in 2011 (there were no Internet criminal cases initiated in 2012). However, there were 24 verdicts in the end-user cases, up from 19 in 2011, but down substantially from 83 in 2007; there were 70 “channel” case verdicts in 2012, down from 180 in 2011, and 325 in 2010 (and no Internet verdicts in 2012).

MPA reports that enforcement activity in 2012 was about the same as in 2011, with most of it concentrated in Moscow and St. Petersburg, but like other industries, was down overall from only a few years ago, as a result of the reorganization of the police and severe reductions in enforcement personnel. The motion picture industry reported box office receipts in Russia in 2012 was US\$1.24 billion (an 8% increase from 2011).

An intensification of criminal investigations and criminal convictions against principals of organized commercial pirates is sorely needed, especially directed at Internet operations. Criminal procedure changes which placed copyright infringement cases into the category of serious crimes have enabled – at least in theory – Russian law enforcement agencies to conduct thorough and comprehensive investigations of copyright infringement activities against owners and operators of piratical operations. However, deterrent criminal penalties have rarely, if ever, been imposed against owners of commercial Internet operations. One practical problem that has surfaced recently is that police and prosecutors have had difficulty applying the criminal law thresholds to Internet crimes which has resulted in very few such cases commencing and even fewer ending in court rooms. The 2011 increase in the criminal threshold without special consideration of its application to Internet offenses, as was done in the United States (in the Net Act), could exacerbate this problem; this further underscores the importance of also using administrative authority in digital piracy cases. Deterrent criminal penalties are still not being imposed against optical disc plant owners or, with few exceptions, against plant operators (no plant owner has ever been convicted and only a handful of plant managers or employees).

The lengthy criminal investigative process must also be examined and redressed, particularly at the provincial level. As the government continues to rely on its own experts in investigating, examining and prosecuting IPR violations, it should take measures to increase the number of experts and consider the appointment of a

specialized unit of investigators and prosecutors, adequately trained and provisioned to effectively address IP crimes. Due to the lack of adequate staffing and the high volume of work, examinations of products seized take months. Enforcement is also hampered, and trials delayed, by the requirement that exemplars be collected only by state officials (or jointly with rights holders), and by a statutory reliance on government expert reports. Delays also result from a lack of subject matter expertise in some cases, as well as a reluctance to use or rely on rights holder expertise on forensic matters (and worse, some local authorities refuse to share any information on cases with rights holders at the investigative stage, impeding the success of these cases). These arcane and outdated rules relating to expert evaluations create unnecessary delays and costs in litigation. Industry experts should be fully integrated into the judicial process, so it is recommended that the rules be modernized for greater efficiency. One way to accomplish this would be for the Supreme Court to issue new guidelines on the admissibility of the testimony of private experts. The problems are further exacerbated by ongoing reforms of the investigative bodies. ESA continues to report delays in examination reports from government experts, due to a lack of technical expertise.

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

Another recommended measure is the appointment of IPR special prosecutions, investigators, and police officers at both the federal and regional levels throughout Russia. The appointment of specialized IPR investigators could, if utilized correctly, significantly increase the efficiency of IPR criminal investigations. The copyright industries are willing to continue their assistance in this regard with training programs for judges and other law enforcement officials. IIPA recommends that the Investigative Department of MVD should continue to work with IIPA members on future training programs. IIPA recommends that the General Prosecutor's Office (along with the MVD-IC) appoint a government liaison with IP rights holders to more effectively bring criminal investigations and trials to successful conclusions. The approval in 2011 of a specialized IP court in Skolkovo (the innovation center), to be implemented in February 2013 (with thirty trained judges), is a positive step (and even more so if these courts are eventually created in other cities and regions across Russia). In 2012, the Government of Russia, including Prime Minister Medvedev, convened an anti-piracy/anti-counterfeiting forum that included over 1000 participants from the copyright and trademark industries (including IIPA members); one recommendation is to make this an annual event.

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

**Raids Against Businesses Using Pirate Products:** While the number of criminal end-user raids (and verdicts) were down substantially from a few years ago, as noted above, BSA did report good cooperation with enforcement officials. In 2012, the number of *ex officio* end-user raids declined even in major cities including Moscow and Rostov-on-Don (among others), and there was inconsistent enforcement in other cities and regions. The continued inconsistency in the number and quality of raids stems from the lack of a uniform methodology promulgated by the Investigative Department of MVD, the Investigative Committee of Russia, and the General Prosecutor's Office in relation to implementation of Article 146 of the Criminal Code. Investigators often do not consider evidence collected by police during raids as sufficient, but they have been unable or unwilling to provide police with guidelines for evidence collection. Thus, criminal cases are frequently suspended by investigative authorities or terminated by prosecutors.

**Raids at Storage Facilities and Piracy at Retail Outlets:** Several copyright industries continue to report that raids, while undertaken, are not ultimately successful in stopping criminal activity because of: (a) the absence of criminal liability for corporate entities; (b) the failure of the police to comply with the Criminal Procedure Code; and (c) the general reluctance of prosecutors to recommend the initiation of criminal cases. Amendments to the Criminal Code to allow corporate entities to be held criminally liable would help to correct this problem. As one example, CDs and DVDs with illegal software are readily available in markets and in kiosks, but the police only take action against the vendors, not the organized illegal businesses that make those materials available. There were no reported raids against large pirate warehouses in 2012, but there were eight raids (and the seizure of materials) against mid-sized warehouses.

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

While criminal enforcement (by the police) remains the primary IPR enforcement tool in Russia against commercial piracy, beginning in 2011, the business software industry has been able to expand its civil search practices against commercial end-user infringers as a secondary enforcement method. While the number of searches is low (six in 2011, eleven in 2012), this activity has contributed to public awareness for businesses especially, about legal versus illegal activities, as well as helping to legalize software in commercial entities.

**Administrative Enforcement:** The Administrative Code (Article 7.12) provides a range of fines on natural persons (1,500 to 2000 rubles), the owners or managers of legal entities (10,000 to 20,000 rubles) and on legal entities themselves (30,000 to 40,000 rubles), as well as permitting the confiscation and destruction of pirated product. Administrative cases are filed by the police or by agencies, but the levying of fines is done by courts of general jurisdiction (for natural persons) and arbitration courts (for legal entities). Imposing significant administrative fines on legal entities, for example, for the distribution of infringing content or the illegal use of software, would have a deterrent effect (and could be imposed in instances when criminal cases end for failing to meet the high evidentiary burdens). Unfortunately, current administrative procedures are inadequate because of the very low level of fines and the inability to reach commercial enterprises that distribute infringing content (especially when there is no direct payment for such infringing content, but only, for example, advertising revenue, such as at vKontakte). When administrative actions have been undertaken, they have resulted in the imposition of wholly inadequate penalties. BSA reported only 18 administrative court decisions against infringing end-users, and 24 against “channel” pirates in 2012 (none against Internet pirates). This was an increase from the 11 end-user and one “channel” decision in 2011, but is down from the 37 end-user decisions in 2008, or the 11 “channel” decisions in 2009. During 2012, the average administrative fine imposed on legal entities was about 30,000 rubles (approximately, US\$1,000) per case, which is too low to be a deterrent.

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

**Overview of Legal Reforms:** Russia did make progress on legal reforms as part of its WTO accession. For example, it added *ex officio* authority to the Customs Code (in force on December 29, 2010) to permit the interdiction of suspected counterfeit and pirated product. Another positive step was the removal of camcording from the scope of the private copy exception, allowing for enforcement against illicit camcording in theaters. Amendments were made in 2012 to the Criminal Code (Articles 81 and 82) pertaining to the seizure and retention of electronic evidence obtained in pre-trial investigations.

However, there remain many key missing pieces to having an effective legal regime – especially for effective Internet enforcement, where the current legal framework cannot address the problem. The Civil Code, Part IV, in force in 2008, made some improvements, but left many reforms either incomplete (implementation of the digital treaties), or inadequate (unclear ISP liability, no notice and takedown procedure, and the other list of deficiencies noted in previous IIPA filings). A 2010 draft set of amendments prepared by the Center for Private Law, had some very troubling provisions pertaining to: (i) the liability of ISPs (Article 1253(1)); (ii) technological protection measure exceptions (Article 1299(4)), and (iii) broad exceptions (Articles 1274 and 1275); it was never enacted. More recently, in 2012, amendments were offered to introduce liability for ISPs (intended to comply with the EU e-Commerce Directive). However, there are no concrete proposals yet on formal notice and takedown provisions or other key proposals; there was discussion in 2012 of a separate concept for a voluntary registry to share information between rights holders and intermediaries.

Since the adoption of the new Civil Code, IIPA and its members have commented on three major overarching concerns: (a) a lack of clarity on numerous provisions (especially exceptions); (b) administrative law principles throughout the Civil Code that likely cannot be enforced by civil or criminal procedures; and (c) the absence of rules that clarify the illegality of providing services that are intended to promote the infringement of copyright and related rights (i.e., a clear basis of liability for online websites and services that induce or encourage infringement). This latter issue is a principal challenge for IIPA: for Russia to define ISPs (and the various services they provide), encourage cooperation on Internet piracy with rights holders to effectively deal with Internet piracy – in civil and criminal law, and to adopt secondary liability provisions. If Russia is to foster legitimate electronic commerce and if the rule of law is to apply to the online world, Russia must develop a balanced system of liability provisions that incentivizes ISPs to cooperate in addressing Internet piracy. Further, it is critical that Russia amend its regime to allow for injunctive relief, especially for Internet matters.

Two other existing hurdles to effective civil and criminal enforcement are: (a) the failure of courts and police to apply statutory presumptions of copyright ownership; and (b) overly burdensome evidentiary requirements to prove title – requiring a “full” chain of title for each recording in every investigation which is especially problematic for foreign rights holders with translation, notarization and other costs. For the music industry, the criminal threshold, now raised to 100,000 rubles, equals 4,000 songs based on the current calculation methodology; this presents a virtual bar to commencing most criminal investigations and denies critical enforcement remedies.

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

On March 26, 2009, the Supreme Court and the Higher Arbitration Court adopted a joint Plenum Resolution (“On issues relating to the introduction of Part IV of the Civil Code”). Unfortunately, the resolution did not resolve a number of legal issues that remain unclear, and as a result problematic for judges trying to enforce IPR infringements. These issues include: the treatment of temporary copies, i.e., defining reproduction as the storage of a digital copy of a work in an electronic medium; the failure to craft explicit liability rules for infringers who pre-install business software on PCs; the failure to establish rules to determine damages (i.e., the value of works), including in instances of a “making available”; and, the failure of courts to apply provisional measures (and to clarify evidentiary rules in civil searches including the retention of materials after raids).

# BRAZIL

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Brazil remain on the Watch List in 2013.<sup>1</sup>

**Executive Summary:** Progress continues in Brazil's long-running struggle with widespread copyright piracy in the physical environment, spearheaded by the expansion of the "City Free of Piracy" initiative from São Paulo to other cities and other initiatives. But systemic bottlenecks in investigation, prosecution and the courts add up to an enforcement system that still struggles to deliver adequate deterrence. Meanwhile, piracy is rapidly migrating online, and Brazil has not put in place sufficient mechanisms to adequately address this. Criminal enforcement against online piracy has stalled, and the informal cooperation of other players in the Internet ecosystem remains inconsistent. As documented in a recent study for the Brazilian government, as broadband penetration increases rapidly, the vast majority of Brazilians who download music and movies from the Internet patronize illegal sources almost exclusively, including notorious Internet marketplaces linking to offshore pirate repositories, and illicit peer-to-peer (P2P) services. In this environment, it is difficult for services for legitimate delivery of copyrighted works online to gain traction, although there are a few positive trends in the music sector, notwithstanding the continued existence of an online environment dominated by infringement. Meanwhile, 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. Good progress has been made in addressing software piracy (including unlicensed software use by enterprises), but the overall level of such piracy remains high.

Brazil's copyright legal regime needs modernization to sufficiently address the copyright protection and enforcement needs of all copyright sectors. For example, the copyright law lacks clear liability rules for Internet Service Providers (ISPs). Additionally, deficient laws against circumvention of technological measures used by videogame copyright owners to restrict access and copying, coupled with exorbitant taxes and duties on legitimate imported videogame consoles, has stunted the development of a legitimate market for these games in Brazil. Current copyright reform efforts would take some modest steps forward to address some of these issues (but, unfortunately, some steps backward on technological protections); but even these appear to have stalled. Meanwhile, an overall "law of the Internet" proposal is under active consideration by Congress. While this should be an important opportunity to strengthen copyright protection, instead this initiative as drafted overlooks the role of copyright protection in delivering a healthy and viable Internet marketplace, and may undermine the ability to foster the kind of cooperative relationships that are necessary to enhance online accountability for the benefit of society by encouraging legitimate commerce. We note there have been recent proposals to amend this legislation to preserve the possibility of notice-and-takedown and other needed copyright remedies, and urge that these be adopted. Finally, prompt Senate approval of a bill passed by the House of Deputies to streamline copyright prosecutions would be an excellent step toward broader enforcement reforms. Along with copyright law reform, reduction of market access barriers, and Internet legislation that respects intellectual property rights, Brazil should be encouraged to take these steps toward a legal regime that effectively addresses all forms of piracy and bolsters the growth of its creative industries.

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<sup>1</sup>For more details on Brazil's Special 301 history, see IIPA's "History" appendix to this filing, at <http://www.iipa.com/pdf/2013SPEC301HISTORICALCHART.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 2013 Cover Letter to this 301 submission at <http://www.iipa.com/pdf/2013SPEC301COVERLETTER.pdf>.



## **PRIORITY ACTIONS REQUESTED TO BE TAKEN IN 2013**

### **Enforcement**

- Sustain and expand the “City Free of Piracy” initiative to implement coordinated attacks on hard goods piracy in more major cities, and verify that the cities that have signed on to the initiative are abiding by their commitments to increased and effective enforcement.
- Ensure that the National Council to Combat Piracy and Intellectual Property Crimes (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.
- Building on the CNCP Internet working group, set up monthly roundtable discussions among rights holders and the ISP industry to achieve a cross-industry agreement to combat Internet piracy in Brazil.
- Launch criminal prosecutions 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 reform sentencing practices to achieve deterrent impact.

### **Legislation and Regulation**

- Advance copyright law reform legislation to modernize Brazil’s copyright legal regime, including by keeping any new limitations and exceptions narrowly focused to achieve their intended purpose, 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 fostering (not impeding) copyright enforcement and by authorizing right holders, ISPs and consumers to enter into constructive and cooperative voluntary agreements and procedures to combat online piracy.
- Enact pending legislation to streamline copyright prosecutions and to clarify forfeiture and destruction remedies.
- Reduce high tariffs and taxes placed on videogame products.
- Avoid implementing significant government procurement preferences for locally produced copyright products, such as software, that will effectively close the market to foreign companies.

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 eleven months of 2012, almost \$2.1 billion worth of Brazilian goods entered the U.S. under the duty-free GSP code, a 10.6% increase over the same period in 2011, and amounting to about 7.1% 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 software industry continues to combat high rates of enduser piracy by corporations and other enterprises. The book publishing industry still confronts widespread unauthorized photocopying of educational materials. The videogame industry continues to see pirated games and circumvention devices widely available for sale in markets throughout the major cities.

**Piracy Impacts:** A study conducted for the Motion Picture Association of America (MPAA) in 2011 by IPSOS and Oxford University quantified the overall economic impact of piracy in Brazil on the audiovisual sector.<sup>2</sup> 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 (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 BSA | The Software Alliance (BSA), found that 53% of PC software installed in 2011, with a commercial value of more than US\$2.8 billion, was unlicensed.<sup>3</sup> In an earlier study, IDC 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 ten point reduction were achieved in two years, yielding over \$5.2 billion in added GDP and nearly \$1.2 billion in new tax revenues.<sup>4</sup>

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 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.<sup>5</sup> But the development of a robust legitimate online marketplace in delivering copyrighted materials to these users continues to be stunted by the prevalence of online piracy. The Internet is certainly the fastest-growing forum for piracy in Brazil, and has become the primary piracy challenge for several industry sectors.

A study conducted for the Secretary of Strategic Affairs of the Presidency of the Republic by the Ipea public foundation, and released in May 2012, concluded that "online piracy appears to be widespread among downloaders of music and films, including individuals from all economic classes, regions, age brackets, levels of formal education and employment status..... Estimates made by authors indicate that at least 41% of Internet users could be classified as 'pirates' in 2010."<sup>6</sup> This study, which was intended to provide "a summarized, objective assessment" of the situation by a respected foundation that "offers technical and institutional support for government decision-making," also estimates that some 81% of Brazilians who download music or films from the Internet do so exclusively from illegal sources. The Ipea study corroborates in general terms the findings of a number of industry studies that indicated the pervasiveness of online piracy in Brazil.

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<sup>2</sup>Economic Consequences of Movie Piracy: Brazil," January 2011 (on file with IIPA).

<sup>3</sup>BSA | The Software Alliance's 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Brazil was 53%, representing a commercial value of unlicensed software of US\$2.85 billion. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA's 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

<sup>4</sup>See [http://portal.bsa.org/piracyimpact2010/cps/cp\\_brazil\\_english.pdf](http://portal.bsa.org/piracyimpact2010/cps/cp_brazil_english.pdf).

<sup>5</sup>See <http://www.budde.com.au/Research/Brazil-Telecoms-Mobile-Broadband-and-Forecasts.html>.

<sup>6</sup>Comunicado do Ipea - 2012 - Maio - nº 147, "Download de músicas e filmes no Brasil: Um perfil dos piratas online", at [http://www.ipea.gov.br/portal/index.php?option=com\\_content&view=article&id=14071](http://www.ipea.gov.br/portal/index.php?option=com_content&view=article&id=14071) (unofficial translation on file with IIPA). Note that this study used a very conservative definition of "online pirate," which excluded any downloader who purchased music, films or ringtones on even a single occasion online or offline during the previous twelve months. It thus appears from this study that two-fifths of all Brazilian Internet users rely exclusively on illegal online sources for the music and films they consume.

Internet piracy problems in Brazil involve two main distribution channels. The first involves sites that link to infringing distribution hubs (sometimes called “cyberlocker” services), nearly all of which are located outside Brazil. (Brazilian websites that directly host pirate content remain relatively rare.) Link sites to infringement hubs account for over 60% of online music piracy, and at least that proportion of the Internet piracy cases involving audiovisual works like movies and TV programs. Sites such as 3000filmes.com and baixedetudo.net (which translates to “download everything”) are flagrant examples of sites that aggregate links to pirate movies (including via streaming)<sup>7</sup> and music, with the latter also engaged in distributing hacked or cracked software codes or programs, and that attract high volumes of visitors. One very popular site in this category, degracaemaisgostoso.org (“free is much better”), reaches 1.5 million unique users each month, while Musicas para Baixar (“music for download”) has 900,000 unique users monthly. Some of these linking sites, like baixedetudo, have now moved their hosting out of Brazil, and the files to which they link are generally stored on offshore hosting sites such as 4Shared and Depositfiles. But, the sites themselves are available only in the Portuguese language and clearly target the Brazilian market almost exclusively. 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. Many Brazilian sites also employ unique methods for undermining anti-piracy efforts, such as the use of local encryption and “captcha” technology to prevent rights holders from detecting links to infringing files through automated monitoring.

The second channel for Internet piracy is filesharing via illicit P2P networks. While there is still filesharing of music (accounting for over 30% of online music piracy) and audiovisual 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, boasting a 47% year-on-year growth rate, followed by eDonkey and Ares. Indeed, in 2012, Brazil again 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. According to the Ipea report referenced above, Brazilian telecommunications operators estimate that 50-60% of all Internet traffic in Brazil consists of P2P traffic.

Other forms of networked dissemination of pirate products in Brazil include: the use of online auction sites to sell circumvention devices, such as game copiers<sup>8</sup>; LAN houses and Internet cafés 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 many of the efforts to develop legitimate online distribution channels for copyrighted works in Brazil. One relatively bright spot in this picture is the robust growth in the past year of the legitimate market for online music, including the successful roll-outs of international services such as iTunes and Rdio. Online revenues are projected to expand in 2012 by 80% over 2011, and to account for more than 30% of local music industry revenues (compared to 17% in 2011). The fact remains, though, that the online music marketplace is dominated by illegal sources, with only a small minority of Brazilian online consumers patronizing authorized services (as documented by the Ipea study).

**Hard Goods Piracy:** Even as more of the piracy problem shifts to the Internet, pirate hard goods remain an enormous problem in Brazil. Large-scale distribution networks involve thousands of street vendors, established facilities (such as gas stations) which blanket the major highways, and stalls in camelodromos (street markets). Hundreds of millions of blank media discs (CD-Rs and DVD-Rs) enter Brazil each year from ports throughout the country, mainly from Paraguay, China, Hong Kong and Taiwan, and are used to burn pirate musical recordings, movies, and software.

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<sup>7</sup>For 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 videobb.com.

<sup>8</sup>One ESA member company reports that internet auction sites in Brazil are responsible for more than twice as many listings of circumvention devices than any other country.

Physical piracy of entertainment software remains quite prominent in Brazil's two largest markets, São Paulo and Rio de Janeiro, and is also prevalent in other states. In downtown São Paulo, ESA representatives continue to find burning labs servicing sellers of pirated games in street markets and shopping centers, as well as street vendors. In Rio de Janeiro, the Camelódromo Uruguaiana continues to house sellers of pirated games, modified consoles and other circumvention devices, despite periodic raids that serve to temporarily reduce these numbers. In the capital city, the large open air market Feira Do Paraguai has been the venue for sales of pirated games for many years, with a December 2012 raid confiscating several thousand copies from sellers in this market. Pirated games are generally sold on discs and micro secure digital (SD) 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 São 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, Wii and Xbox, and the R4 devices and other game copier circumvention devices, at prices as low as US\$39-59. Typically, sellers of the game copiers also include a memory card with 50-150 game titles that were illegally downloaded from the Internet. As noted above, these circumvention devices are significant multipliers that exacerbate levels of online piracy by enabling the use of unauthorized copies of game software. Game copiers and mod chips generally are produced in Asia and are flown into Brazil or delivered through the same channel for modified game consoles.

Hard goods piracy in the music sector is less visible than before, as more music piracy shifts to the Internet. However, pirate CD-Rs persist in the streets and flea markets of São Paulo, São 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 São 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 ESA 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 authorized release of DVDs or during the theatrical release window) are especially damaging to legitimate businesses, including local movie theaters, video rental stores, and the home entertainment market.

The Independent Film and Television Alliance (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 routinely offered for free online and with the same quality viewing experience that a DVD can provide. Unable to compete with free, legitimate DVD distributors in Brazil are not able to commit to distribution agreements, or they 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.

**Software Piracy:** BSA reports that while gradual progress has been made (the software piracy rate dropped from 54% to 53% in 2011, down from 59% in 2007), software piracy in Brazil continues at a high level, including unlicensed software use by 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.

**Camcord Piracy:** Ninety percent of all pirated movies originate as illegal camcords. Unauthorized in-theater audio camcording spiked in Brazil beginning in 2008 and continued to increase in 2012. MPAA identified 44 member company films stolen from Brazilian theaters in 2012, a 19% increase from 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 or 2012.<sup>9</sup> IFTA reports that camcording in Brazil fuels rampant online piracy, negatively impacting worldwide distribution and preventing the establishment of legitimate online distribution platforms.

## **COPYRIGHT ENFORCEMENT IN BRAZIL**

### **Enforcement Overview**

The challenges of enforcement against piracy in Brazil have been extensively detailed in past IIPA filings. While much of the picture remains the same for 2012, progress continues against hard goods piracy, with the expansion of the successful "City Free of Piracy" initiative beyond São Paulo into other major cities, and a record number of piracy convictions. But a number of important issues have not been adequately addressed, including the need for more law enforcement resources; staggering court backlogs; and, the need to impose more deterrent penalties. Meanwhile, the lack of effective enforcement against the pervasive menace of online piracy means that the prospects, for all copyright sectors, of establishing robust e-commerce marketplaces in Brazil for copyright materials remain dim.

As IIPA has detailed in past reports, the CNCP 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 element of the most successful aspects of CNCP activities over the years has been the robust participation by organizations representing many of the copyright industries in seeking practical solutions to piracy problems. A reorganization of the Council by the Ministry of Justice in early 2012 sparked concerns about whether the CNCP would maintain the high level of participation and cooperation with industry groups that has been its hallmark, although we understand the CNCP has continued to engage with many key industry groups throughout the year. It is critical to closely monitor developments and urge the Ministry of Justice to take the necessary steps to ensure that the reorganized CNCP continues to work closely with industry, and that it is adequately resourced. One key area where the CNCP has not made progress is the development of a plan to address online piracy.

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

During the first eleven months of 2012, the number of piracy convictions in Brazilian courts set another record: 744 (up from 704 in 2011 and only 501 in 2010). 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

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<sup>9</sup>MPAA 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.

fewer raids, it may have been more effective than the more scatter-shot efforts of the past. In building on the success of the “City Free of Piracy” project carried out in the City of São Paulo in 2011, the program has been expanded to Curitiba, Brasilia, Belo Horizonte, Osasco, Rio de Janeiro, Vitoria, Cuiaba, and Varzea Grande, with more cities expected to join up in 2013. All these cities saw stepped up enforcement action against long-time hard goods piracy hot spots, in a coordinated effort of law enforcement on the municipal, state and federal levels. It is critical that these coordinated campaigns be sustained and expanded, and that the active participation of city authorities in improved enforcement be verified. The working relationship between copyright industry anti-piracy organizations and the Brazilian authorities in the field of physical piracy remains excellent.

Despite these encouraging signs, many critical bottlenecks and deficiencies in Brazil’s enforcement system remain to be addressed. While the number of criminal convictions increased in 2012, 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) are in:

- 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 several specialized IPR experts at the “*Instituto de Criminalística*” (CSI Institute of Brazil) with the capacity for full-time dedication to piracy cases would also help address the problem.
- 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<sup>10</sup>, 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.
- Creating a specialized court for copyright matters, at least in a few major jurisdictions such as Rio de Janeiro and São Paulo, would improve judicial expertise and help expedite case processing. The Industrial Property Law (Law No. 9279, which entered into effect in 1997) authorized the judiciary to create specialized IPR courts, and such courts exist for patent and trademark matters, but this authority has never been exercised with respect to copyright.
- Finally, criminal penalties imposed on pirates are too frequently suspended. Since prosecutions take so long to reach final disposition, a defendant who may have been caught multiple times is treated as a “first offender” so long as none of the other prosecutions is complete; and a suspended sentence for a first offender is treated as almost an inalienable right in the Brazilian legal system, sometimes conditioned on the defendant agreeing to provide minimal monetary compensation to the victim.<sup>11</sup>

In sum, from initiation of the case through its conclusion, Brazil’s criminal justice system does not adequately deter copyright piracy. Similar concerns apply to 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

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<sup>10</sup>For example, in 2012, BSA sponsored four training sessions for 80 court experts on examination of software and licenses.

<sup>11</sup>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.

business software, escalating to the filing of civil lawsuits against specific companies that will not agree to purchase required licenses. While this enforcement campaign is effective in its overall goal – to encourage businesses to legalize their software use – its effectiveness is undermined by 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.

A major enforcement impediment identified by BSA is the extremely high expense for forensic experts who conduct searches and seizures in civil cases and analyze the results, and for bonds imposed on U.S. and other foreign rightsholders. 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. This situation has remained unchanged since 2005, and requires legislative reform to permit sampling and private sector assistance in the forensic work.

In those cases that do proceed to judgment, BSA is pleased to note that relatively fewer courts have simply been ordering companies to pay the license fee they would have had to pay in the first place for the software they have been using without authorization. Instead, fines of multiple times the market value of the unlicensed software are increasingly being imposed. This provides greater deterrence in those cases that proceed to final judgment, but also sends a message to companies that they should not wait to be sued before legalizing their software use.

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.

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

Effective enforcement against the growing problem of Internet piracy in Brazil will require positive and active cooperation among rights holders and ISPs. This cooperation is forthcoming in some areas. Purely on an informal basis, a number of ISPs are responsive in a reasonably prompt fashion to requests from rights holders to remove individual links to pirate sites; to take down individual unauthorized files they may be hosting;<sup>12</sup> to delete advertisements for infringing copies; and even to shut down blogs, forums and social networking communities that are dedicated to disseminating pirate product. But clearly this piecemeal and passive response is not by itself sufficient to cope with the rapid growth in online piracy of all sorts of copyrighted materials, 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 rights holders together to find effective means to deal with the most serious forms of online piracy, and to prevent its further growth. As long ago as 2008-9, 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 little progress toward this goal. While the convening of a working group under CNCP auspices in 2012 on “Intellectual Property and the Internet” is a hopeful sign, thus far there has been no participation in it by ISPs. In the past, some government agencies have impeded the search for cooperation.<sup>13</sup> In 2010, an initial legislative draft for Internet regulation (discussed below)

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<sup>12</sup>As noted above, hosting sites based in Brazil are not the major sources of the online piracy problem there.

<sup>13</sup>In 2009, when the Ministry of Justice asked several agencies for comments on a proposal for a “warning system” through ISPs to customers whose IP addresses were identified by rights holders as “heavy uploaders” of film and music content, the consumer protection agency (DPDC) opposed it on the stated grounds that an ISP sending warnings to their customers at a third party’s request would violate the subscriber’s right to privacy, and the proposal was derailed. At the Ministry of Justice’s request, the DPDC (which reports to Justice) was asked to reconsider its position, but to date its opinion remains unchanged.

seemed to discourage or even prohibit the limited voluntary actions ISPs are now taking to remove access to pirated hosted content after rights holder complaints. In any case, 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 urges the Brazilian Government to revive this initiative, in order to send a clear signal that effective cooperation against the piracy that now blights the online marketplace is in the best interests of Brazil's economic, technological and cultural development.

The situation is different with regard to criminal enforcement against serious online copyright crimes. Existing legislation provides a framework for this, and Brazilian enforcement authorities have considerable experience in investigating online crimes in other areas. But, 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. 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 slowed considerably. For example, while 13 criminal investigations have been opened in eight states against the operators of 36 websites that offer cyberlocker links for unauthorized downloading of music, none has yet resulted in a prosecution, even though all have been pending for at least a year (the first of these cases was presented to police in September 2010). Even though court orders have been obtained requiring ISPs to disclose information relevant to some of these cases, most of these orders have not yet been fulfilled. 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 P2P programs, or that clearly and intentionally build their business on providing links to clearly infringing materials.

## **LEGISLATION AND REGULATION IN BRAZIL**

**Copyright Law Reform:** Brazil's copyright law is in need of updating to reflect today's copyright protection and enforcement challenges. In March 2011, the Ministry of Culture released a revised draft of copyright law amendments for public comment. Press reports indicated that further revisions were made before a draft was forwarded to the President for a final analysis; but with the arrival of a new Culture Minister in mid-2012, the draft was returned to the Ministry, and appears to have stalled. IIPA understands that a new draft is being prepared and may move forward in the first half of 2013.

IIPA submitted detailed comments on the revised 2011 proposal, as did several IIPA members. IIPA's comments welcomed Brazil's efforts to modernize its copyright law. The 2011 draft contained a number of positive features, including a narrowing of some of the excessively broad exceptions to copyright protection that had been proposed previously, and the establishment of a liability regime applicable to the online hosting of infringing content, which would increase the incentives for providers of such services to cooperate with right holders, such as through a notice and takedown system. However, a number of significant problems remained unresolved. Some of the more important include:

- The draft proposal does **not provide adequate safeguards for TPMs used by copyright owners to control access to or copying of their works**. As noted, the shortfalls in Brazilian law on this topic have led to a virtually unregulated market in game copiers, mod chips and other circumvention technologies. 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. Under the 2011 draft, current law would be further weakened by 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 have imposed a new tort

liability on rights holders if TPMs are later found to inhibit the use of such limitations. While the latter liability would not have applied to TPMs that are “essential to the purchase or licensing of works in digital media,” that exception was 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, and IIPA urges Brazil to avoid these pitfalls when the new copyright law reform proposal is drafted.<sup>14</sup>

- Several of the **exceptions to copyright protection** in the 2011 draft bill were 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 appeared 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.
- With regard to applicability to **computer programs**, it should be clarified that Brazil’s Software Law still governs the issue of **limitations and exceptions to copyright protection** for such works.
- 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 2011 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 Article 105-A of the 2011 draft, while welcomed, also needed 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.

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 rights 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,” was the subject of intensive discussion in Brazil’s Congress in 2012, but remains pending there. From IIPA’s perspective, the fundamental flaw of the legislation, ever since its initial draft was released in 2010, is the omission of 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. In particular, Article 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; Article 14 immunizes all “providers of Internet connections services” even in that circumstance; and providers could claim these sweeping

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<sup>14</sup>Law No. 12.737/2012, which came into force in December 2012, improves criminal remedies for “undue violation of security mechanisms .... to obtain, tamper or destroy data or information.” Producing or trafficking in devices or software to enable breaking into computers, tablets and other devices would also attract criminal penalties, as would dissemination of material obtained by the invasion. While this commendable cybercrimes initiative could be applicable to some scenarios of circumvention of TPMs, it is no substitute for more comprehensive legislation as outlined above.

immunities even if they refuse to cooperate in dealing with those who employ Internet access to commit copyright theft. Furthermore, because the bill makes no provision for any notice and takedown system, even for infringing hosted content, it could be read to prohibit any such system from being adopted under the copyright law or on a voluntary basis. Indeed, the initial release of the draft bill in 2010 was perceived in many quarters as a statement discouraging voluntary cooperative anti-piracy measures. While some of these potential constraints are subject to interpretation, it is necessary to have a clearer provision on the possible notice and take down mechanisms.

IIPA is quite encouraged by recent reports that Article 15 of the bill will be modified so that the immunity would not apply to cases of violation of copyright or neighboring rights. This would be a significant improvement to the legislation and would preserve Brazil's ability to design an effective and flexible legal regime for dealing with the online copyright theft. However, the modified legislation has not yet been approved by the House of Deputies due to other unresolved issues in the bill. At the same time, the bill could benefit from other improvements to reflect a more balanced legal framework for the Internet and e-commerce that includes an appreciation of the importance of copyright protection as a critical framework element. To reflect this balance, the bill should be modified to recognize the responsibilities, as well as the rights, of Internet users, to ensure that privacy and data protection rules accommodate respect for the rights and freedoms of all stakeholders, including intellectual property rights, and, to allow for the reasonable use of network management tools, including those that facilitate dealing with massive online infringements. IIPA looks forward to reviewing the bill as it makes its way through the legislative process.

**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 enforcement measures and penalties for copyright infringement. A number of bills were introduced, but few of them progressed until 2012, when Bill 2729/03 was approved by the House of Deputies. This legislation contains a few vital reforms, such as allowing expert reports in infringement cases to be based on a sampling of the goods seized, and authorizing the destruction of all pirate product seized in a criminal case. If adopted by the Senate and ultimately enacted, this bill will streamline criminal prosecutions and reduce the significant costs entailed in storing vast quantities of seized materials until the final resolution of a criminal case. IIPA urges its passage as soon as possible, but also calls attention to a number of other provisions of the original bill (and other proposals) which had to be jettisoned to expedite passage. Once these initial reforms are adopted, IIPA urges Brazilian legislators to turn to consideration of some of these other long-overdue enforcement reforms.<sup>15</sup> We also note that the debate on reform of the Criminal Code getting underway in the Senate should be closely watched, as it includes consideration of penalties for intellectual property offenses.

## **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 on the Audiovisual Sector (Law 12.485):** This law, which entered into force in September 2012, 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

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<sup>15</sup>Taken together the various bills would, among other improvements, allow criminal judges to appoint private sector experts; increase government resources allocated to fighting software piracy; criminalize the advertisement of pirated products, the distribution of instructions on how to manufacture counterfeit goods, and the purchase of pirated goods intended for resale; 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.

push consumers towards illegitimate sources of content. MPAA participated actively in hearings on the new law's implementing regulations, and will continue to monitor developments such as the crucial definition of Brazilian audio-visual work for purpose of applying the quotas. It is also participating in public hearings in the Brazilian Supreme Court, where lawsuits have been filed challenging the constitutionality of the law. Careful scrutiny is required to minimize this law's adverse impacts.

**Software Procurement Preferences:** As part of a plan to foster IT sector growth, the Brazilian government last year proposed a new program to evaluate and certify software products as locally developed in order to qualify them for existing government procurement price preferences as high as 25% (the Certification of National Technology Software and Related Services (CERTICs)). While the overall goal of bolstering the local Brazilian IT industry is commendable, it should not be done in a way that discriminates against foreign providers of software and other IT goods and services and ignores the global supply chain through which these products are developed. The development of this program should be carefully monitored to ensure that it does not unduly restrict access of foreign software and other IT products to the Brazilian procurement market.

**Patent Pendency:** Brazil's patent pendency problem undermines IP protection and market access for both foreign and Brazilian software and other innovative companies in the Brazilian market. There is a ten-year (or more) backlog in computer implemented patent applications, in part because there are too few patent examiners (INPI, the Brazilian patent office, only has 12 examiners in the ICT division, and as many as half of those are scheduled to retire within a year). In addition to staffing for INPI, greater regulatory flexibility is needed so that INPI can implement novel solutions that require no additional funding to reduce the patent backlog, such as queue swapping, techniques to encourage abandonments, using positive patent examinations from other jurisdictions to permit work sharing in Brazil, etc. Putting out the March 14, 2012 proposed Patent Examination Guidelines for computer implemented inventions for public comment, and the recent initiative by the Brazilian government to support a significant increase in the number of examiners for INPI, are positive steps. We urge the Brazilian government to move forward and build on these efforts.

# BULGARIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Bulgaria be placed on the Watch List in 2013.<sup>1</sup>

**Executive Summary:** Widespread online piracy continues to wreak havoc on the market for legitimate sales of many creative works in Bulgaria. Unfortunately, enforcement against Internet piracy is not adequate to slow these trends. Prosecution and judicial treatment of copyright crimes lack the capacity or attention to bring cases developed by the Cyber Crime Unit at the General Directorate to deterrent decisions. The first case against the notorious torrent tracker arenabg.com, based on a raid in 2006, was terminated in 2012 with an administrative fine amounting to 1000 BNG (equal to approximately 682 USD), while another symbolic case brought against the torrent tracker zamunda.net, based on the raid in 2007, is still languishing in the courts. The popular video streaming service VBox7.com provides hosting services to hundreds of thousands of sound and video recordings without authorization, but goes without ultimate action by Bulgaria's authorities. Rights holders in music and sound recordings are further weakened by amendments to Bulgaria's copyright law that significantly hinder their ability to operate in the market in Bulgaria, in particular in the absence of legislative or cooperative measures to address mounting online piracy of music. Online piracy is also detrimental for the film and TV program distributors. Notwithstanding these problems, the software industry has seen some positive progress against software piracy over the past year.

### PRIORITY RECOMMENDED ACTIONS FOR BULGARIA IN 2013

- Revisit proposals to adopt new provisions on administrative measures for combating online piracy.
- Take the necessary steps to close torrent trackers zamunda.net and arenabg.com, setting a strong example for other infringers.
- Establish a dedicated IPR enforcement agency to coordinate the various entities involved in IPR protection and enforcement.
- Increase public-private cooperation within prosecutors' offices and improve timely prosecutorial attention to copyright crimes.
- Complete an updated Manual for Uniform Prosecutors' Practices in Investigating and Prosecuting IPR Crimes for circulation by the Attorney General as mandatory instructions to district and regional prosecutors.
- Modify the 2011 amendments to the copyright law to counteract the incorrect presumption among the Bulgarian public that rights holders are fairly compensated for pirated downloads and other uses, and to resume the now inoperable collective management of simulcasting, webcasting, private copy, and performance remuneration rights in Bulgaria.

### THE NATURE OF PIRACY IN BULGARIA

Numerous download sites, BitTorrent sites, Rapidshare sites, online storage servers, streaming 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. In 2012, there were only ten legitimate online music services in Bulgaria, and with

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<sup>1</sup> For more details on Bulgaria's Special 301 history, see IIPA's "History" appendix to this filing, at <http://www.iipa.com/pdf/2013SPEC301HISTORICALCHART.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/2013SPEC301COVERLETTER.pdf>.



insignificant market share, as all of the legitimate online music services struggle to survive in a marketplace with an extremely high online piracy rate, and cannot contend with the multiple different pirate services, most notably notorious pirate sites like *zamunda.net* and *arenabg.com*, which still function together with the user-generated video exchange platform, *VBox7*.<sup>2</sup> By 2012, the registered and legitimate online film and TV services totaled only 16, insufficient to meet the demand of the Bulgarian audience, which then turns to pirated content.

The music and film piracy situation persists notwithstanding some laudable efforts of the Cyber Crime Unit. Thanks to the Unit, in 2012 five torrent trackers hosted in Bulgaria (*data-bg.org*, *filebox1.com*, *unhide-torrents.com*, *elit-bg.com* and *p2pb.com*) have ceased their activities in which they were encouraging large-scale copyright infringement. 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, over 50 sites hosting protected video and audio content and offering streaming in real time have ceased operations, most of them having been created based on ready-for-use free forms located abroad such as *ovo.bg* and *alle.bg*. Court cases continue against some of the largest pirate sites, including *zamunda.net* and *arenabg.com*. Unfortunately, while the cases continue, *zamunda.net* has seen a spike in its popularity, reportedly generating enormous revenues from advertising.

Public awareness efforts are sorely needed to demonstrate the importance of intellectual property protection for the development of creativity and innovation, and for economic growth. In late 2012, local organizations, including the MLC - PROPHON, the broadcasters' association ABBRO, the authors' society MUSICAUTOR, and the Bulgarian Association of Music Producers (BAMP), engaged in a fruitful collaboration for a public awareness campaign, with the support of the U.S. Embassy in Sofia and in partnership with the Ministry of Culture and the Municipality of Sofia. In addition, in 2012, the largest private TV channel, (bTV) in partnership with 35 T, radio stations, film distributors, anti-piracy organizations, and authors' societies, launched an educational campaign on the importance of intellectual property – *fairplay.bg*. Two video clips featuring a popular Bulgarian singer and actor have been broadcast, though much work remains. There is a dire need for the Government of Bulgaria to provide high-level political support for long-term public sector programs, emphasizing the social and economic importance of intellectual property rights and countering populist messages in favor of piracy.

## **COPYRIGHT ENFORCEMENT IN BULGARIA**

The software industry reports marked improvements in Bulgarian law enforcement actions in 2012. BSA | The Software Alliance (BSA) notes that in the past year, the Ministry of Culture has taken regular administrative enforcement measures and engaged in good collaboration with the private sector, despite their very limited human resources. The Ministry of Interior (and particularly the Ministry's Cyber Crime Unit at the General Directorate to Combat Organized Crime) likewise, has taken on regular criminal enforcement actions in software cases and collaborated well with the private sector, despite resource challenges of its own.

Moreover, the Bulgarian government has agreed to a software legalization initiative, which started in late 2012 and will continue through 2013. The planned Government-led public awareness campaign informing commercial entities about the various risks related to software piracy was led by the Ministry of Culture (MoC) and the Ministry of Interior (Moi) and was approved and launched by the government in due course. A direct mail campaign by the government was signed by both Ministries without any objections or impediments. This legalisation campaign is scheduled to be carried out in two waves – the first one started in December 2012 and the second one

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<sup>2</sup>*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](http://www.ustr.gov/webfm_send/3215). USTR cited *zamunda.net* as a BitTorrent tracker, explaining, "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."

will take place in February 2013. This direct mailing campaign will reach approximately 21,000 private companies with no government or other public ownership.

BSA's most recent statistics show that the software piracy rate in Bulgaria declined to 64% in 2011, down from 68% in 2007.<sup>3</sup>

For many other members of the copyright sector, serious enforcement challenges persist in Bulgaria. The criminal prosecution of IPR crimes is a lingering weak link in Bulgaria's judicial system. The Minister (and Ministry) of Interior and the Cyber Crime Unit have demonstrated the will to address the piracy situation, and have cooperated with the 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. Representatives of the courts and the Supreme Cassation Prosecution Office (SCPO) have indicated support for stronger criminal enforcement, but prosecutors at the district court level are resistant to change. Cooperation between the private sector and the SCPO should be encouraged to address a chronic problem among prosecutors of wrongfully terminating or refusing to initiate criminal proceedings for IPR offences. In 2012, the Cyber Crime Unit conducted 14 raids, and 18 preliminary criminal procedures have been started, but there is no effective feedback about their further development, since all the preliminary criminal investigations are stuck in the regional prosecutors' offices and many of them are often terminated or suspended by the prosecutors before reaching the court phase. Often the rights holders are not even informed of the developments of those proceedings. A long-term supervision program is needed to monitor and analyze the work of particular prosecutors, observe the grounds for such motions and provide institutional guidelines and methodological support on how to investigate and prosecute IPR crimes.

The new Attorney General's Office should be encouraged to maintain a sustained dialogue with the private sector, with ongoing high-level support of the SCPO, in keeping with existing good practices of public-private cooperation. The competent bodies should promptly complete an updated Manual for Uniform Prosecutors' Practices in Investigating and Prosecuting IPR Crimes and circulate the Manual as an Attorney General's mandatory instruction to district and regional prosecutors' offices.

IIPA recommends consultations with members of the copyright industries in Bulgaria to establish an IPR Enforcement Agency to coordinate Bulgaria's administrative and enforcement bodies involved in IPR protection and enforcement. Such an Enforcement Agency would focus on building adequate administrative and professional capacity. It would also provide specialized training in the field of IPR protection, lists of qualified experts to be used in IPR investigations, and specialized facilities for the purposes of administrative enforcement procedures.

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

**Copyright Law Amendments:** On March 25, 2011 the National Assembly of Bulgaria adopted amendments to the Bulgarian Law on Copyright and Related Rights (LCRR). Disappointingly, much-needed provisions on compulsory administrative measures for combating online piracy were removed from the draft prior to passage. This negative legislative development deepened the problem of the general administrative inefficiency of the Ministry of Culture to cope with law enforcement efforts, especially dealing with digital and online copyright and

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<sup>3</sup>BSA | The Software Alliance's 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Bulgaria was 64%, representing a commercial value of unlicensed software of US\$102 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA's 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

related rights infringements. Instead, the amendments codified a number of flaws, chipping away at the ability for recording artists and producers to be remunerated for the use of their music.

First, revisions to Article 21 of the LCRR have eliminated the right to fair separate compensation for simulcasting as a separate use for which rights holders were previously entitled to equitable remuneration.

In addition, major obstacles to the private copy levy system were adopted into Article 26 of the LCRR, greatly reducing the amount of royalties that can be collected from private copying levies—formerly one of the only sources of revenue in an otherwise difficult Bulgarian music marketplace—so much in fact that it is essentially no longer possible to operate COPY BG, which brings together authors and holders of related rights from music, film industries and theater. Lack of enforcement combined with a popular perception that copying provides some compensation to artists further permits massive infringement with no income at all for rights holders from private copy levies. As a result, the national collecting society for recorded music in Bulgaria, is unable to conclude a reciprocal agreement with its U.S. counterpart to provide fair compensation to U.S. recording artists and phonogram producers for the massive private copying of their protected repertoire in Bulgaria.

The general revision of Article 40 of the LCRR, and the subsequent new articles adopted under the Collective Rights Management Section of the law, have created numerous additional problems. The revisions impose an accreditation procedure, including excessive registration requirements and administrative procedures on Bulgaria's collecting societies, leaving the Ministry of Culture overburdened and facing new administrative inefficiencies. The recognized societies also face heavier scrutiny in comparison to other organizations and private commercial entities (particularly in the field of public performance) that conduct competing activities with effectively no oversight. At the same time, the music industry appreciates the activity of the Ministry of Culture and the efforts of the competent Inspectorate to implement the legal requirements in the public performance sector of Bulgaria. In 2012, the inspections of sites using music for public performance (hotels, restaurants, shops, various retailers, malls, gas stations and many others) almost doubled and reached 405 all over the country. This enforcement trend should be encouraged and actively supported by the Ministry of Culture.

New provisions dealing with the process of negotiation impose a government-monitored tariff setting procedure under which the market value of copyright works is no longer the relevant criterion for rate setting, diminishing the ability for rights holders to agree to fair rates. There is also no working body or mechanism for settlement of disputes between societies and users, leaving no avenue to resolve a multitude of conflicts.

Finally, the amendments to the LCRR failed to eliminate the very problematic law limiting the freedom to enter into contracts for a set number of years (a ten-year limitation, under Article 37 (2), and a five-year limitation, under Article 76 (3)), inconsistent with the copyright industry best practice of producers' neighboring rights for the use of authors' works and artists' rights, respectively. The need to re-negotiate contracts with authors and artists every ten or five years, respectively, prevents producers from exercising their neighboring rights in full.

These amendments have already had a negative impact on the creative community and rights 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. Fallout from the new law is that it has already had a detrimental effect on payments for broadcasting rights: no new tariffs have been agreed upon between the interested parties at the branch level following the new law requirements, and any agreements reached in 2011 and 2012 refer mostly to past periods, covering massive previous unauthorized usage. The result has been serious financial compromises on behalf of the collecting societies, generating losses for rights holders.<sup>4</sup> Delays with the new procedures related to registration of collecting societies in 2011, and the clumsy negotiation procedure of the tariffs

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<sup>4</sup>The 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. Similar agreement was concluded in June 2012 that regulated the licensing terms and due payments for 2011 and by the end of 2012.

approval caused by the latest amendments, have ushered in once again a new era of unauthorized use of music, and a year to come with no expectations for licenses or due payment from Bulgaria's radio and tv broadcasters in 2013. This standstill must be quickly resolved. IIPA hopes that the ruling majority in the Parliament will move quickly to present needed amendments to improve the prospects for effective IPR enforcement in Bulgaria, to curb the piracy rate, and create space for legitimate music services online.

**Proposed new Criminal Code:** Rights holders continue to have concerns about the pending bill for a new Criminal Code, which could seriously hinder efforts for copyright crimes to be vigorously pursued in Bulgaria's courts. In the year since the bill has been in development, no private sector representatives have been allowed to join the draft working group to provide an expert opinion on the provisions concerning intellectual property crimes. Furthermore, the draft changes do nothing to address the new challenges posed by evolving forms of Internet piracy, and instead could open the door for misinterpretations and poor enforcement. IIPA encourages the Bulgarian Ministry of Justice to include IPR experts and representatives as the draft moves forward.

The last amendments of the existing Criminal Code were adopted in 2006 after severe battles with anti-IPR lobbyists in the Bulgarian Parliament. Still, those amendments presented a solid set of provisions for criminal enforcement of IPR, with sanctions that were commensurate with the negative effects of piracy in the market and the general public. It is crucial that the contemplated changes to the Criminal Code continue to account for those concerns, and that they provide the necessary resources to the Cyber Crime Unit within the General Directorate to Combat Organized Crime at the Ministry of Interior so that it may continue its important efforts to police online criminal activity.

# CANADA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Canada be placed on the Special 301 Watch List in 2013.<sup>1</sup>

**Executive Summary:** In 2012, sixteen years after signing the WIPO Internet treaties, Canada took an important step forward toward bringing its copyright laws into line with globally accepted norms for the 21st century. The Copyright Modernization Act (Bill C-11), enacted in June 2012 after several previous unsuccessful attempts at copyright reform, is a significant achievement, and reflects Canada's intent to change the country's reputation as a haven for technologically sophisticated international piracy operations. But much more remains to be done if this intent is to be achieved in practice, and if Canada is to make its market more hospitable to legitimate online offerings of copyright material. To some extent, this turns on how the new copyright law is implemented and enforced, and how and when Canada finally accedes to the WIPO treaties. But there is other important unfinished business, notably the need to transform the copyright enforcement environment through better legal tools (including at the border), revamped law enforcement priorities, greater resources for investigations and prosecutions, and imposition of deterrent sentences on violators. The new Act also falls well short of providing adequate legal incentives for the inter-industry cooperation that will be needed to reduce the exceptionally high levels at which Canadians patronize illicit online sources for creative works. Beyond these long-standing concerns that have not been addressed, the Copyright Modernization Act also added new ones, in the form of a host of potentially problematic new or expanded exceptions to copyright protection. The collective impact of these new provisions on Canada's compliance with its international obligations, and on copyright industries, particularly in the book publishing sector, must be closely monitored.

IIPA associations debated how best to reflect in Canada's Special 301 ranking both the forward steps taken in 2012, and the serious challenges that the new law either did not resolve or even worsened. Ultimately, they agreed to recommend that Canada be moved to the Watch List for 2013, but also to urge that the U.S. Government remain extensively engaged with Canada to make progress on the long list of further changes needed to achieve a healthy marketplace for copyright works in our neighbor and largest trading partner.

### **PRIORITY RECOMMENDED ACTIONS FOR CANADA IN 2013**

#### **Legislative and Regulatory Reform**

- Bring into force provisions of the Copyright Modernization Act enabling accession to the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).
- 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.
- Review new and expanded exceptions to copyright protection, taking into account jurisprudential developments, to ensure full compliance with international obligations, and avoid the risk of unintended consequences due to overly broad construction.
- Adopt strong legal incentives for Internet Service Providers (ISPs) to cooperate with copyright owners in combating online piracy, in accordance with international best practices.

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<sup>1</sup>For more details on Canada's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2013SPEC301HISTORICALCHART.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2013 global issues, see our cover letter at <http://www.iipa.com/pdf/2013SPEC301COVERLETTER.pdf>.



## 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.
- Increase resources devoted to anti-piracy enforcement both at the border and within Canada (including online).
- Vigorously enforce new provisions of the Copyright Modernization Act aimed at suppressing the trafficking in illicit devices or services to circumvent technological protection measures.

## COPYRIGHT PIRACY AND ENFORCEMENT

### The Piracy Situation in Canada – Online

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. As discussed below, provisions of the recently enacted Copyright Modernization Act are intended to provide a new means for effective civil enforcement against the most flagrant online services dedicated to copyright theft. But it is too soon to know whether this intent will be achieved; and even if it is, other online enforcement problems remain inadequately addressed.

Canada is home to some of the world's most popular Internet sites dedicated to piracy. Because Canada has for years been viewed as a country in which laws to address digital piracy are ineffective or non-existent, many sites dedicated to piracy have claimed 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, recorded music, entertainment software, and other copyright materials. IIPA hopes that this phenomenon will abate as the result of enactment of the new copyright law. In an encouraging initial development, one site notorious for trafficking in devices intended to circumvent technological protections for videogames (modchip.ca) apparently ceased operations in 2012.<sup>2</sup> But the overall impact remains to be seen.

During 2012, as many as three of the top four sites listed on one widely accessed compendium of the world's most popular illicit BitTorrent sites depended upon Canadian connections, such as receiving service from a Canadian Internet service provider (ISP).<sup>3</sup> These included isohunt.com, torrentz.eu, and kat.ph, all three of which were once again listed by USTR as “notorious markets ... reportedly engaged in substantial piracy” in its December 2012 Out-of-Cycle Review.<sup>4</sup> Of particular note is Isohunt.com, which comes in fourth on the torrentfreak “most popular” list. This site continues to operate with impunity from Canada, and recently celebrated its tenth anniversary. In 2009, a U.S. court issued a permanent injunction against IsoHunt after finding that over 90% of the downloads made using IsoHunt's services related to infringing content and that the defendants were liable for inducing infringement.<sup>5</sup> Yet its Canadian operator continues to openly run the site and has commenced an action in Canada

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<sup>2</sup>Modchip.ca was one of the world's leading Internet sites dedicated to the sale of circumvention devices for all current consoles. It marketed aggressively to U.S. customers and priced products in U.S. dollars.

<sup>3</sup><http://torrentfreak.com/top-10-most-popular-torrent-sites-of-2013-130106/>

<sup>4</sup>See <http://www.ustr.gov/sites/default/files/121312%20Notorious%20Markets%20List.pdf>.

<sup>5</sup>*Columbia Pictures Industries, Inc. v. Fung*, CV 06-5578 SVW (JCx), 2009 U.S. Dist. LEXIS 122661, at \*39-53 (C.D. Cal. Dec. 21, 2009). The U.S. court concluded with respect to IsoHunt and related sites that “evidence of intent to induce infringement is overwhelming and beyond dispute;” that the sites “engaged in direct solicitation of infringing activity” and that their “business model depends on massive infringing use.”

seeking a declaration that its operations do not violate Canadian law.<sup>6</sup> The scope of these mega-sites is staggering. IsoHunt claims to offer 64.65 million peers and 11 million active torrents. These sites directly impact the U.S. market; for instance, in December 2012, IsoHunt attracted almost 1.2 million unique visitors from the United States.

The major BitTorrent sites offer a mix of pirate product, including music and games as well as films and TV shows. For instance, 1channel.ch, whose operators are suspected to be located in Canada, is the second largest linking site in the world, with links to films, TV shows and music. But online piracy sites specializing in particular categories of works have also found a secure niche in Canada. Despite the shutdown of one of the major sites purveying circumvention devices (as noted above), many Canadian sites (such as R4cardsmontreal.com and gamersection.ca) continue to offer such devices; and computer software that effects a “soft modification” of the security technology of game consoles, and thereby facilitates the play of pirated games, remains available on sites hosted in Canada. Solarmovie.eu, which is hosted in Canada, continues to rise in popularity as a source for links to first-run motion picture and television streaming content. With an Alexa.com traffic rank of 2,000, Compete.com estimates that this site receives approximately 1.5 million visitors each month. Each title is offered with dozens of links to content from multiple sources that are graded by users for quality. 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 like itoma.info are operated from or hosted in Québec.

In this environment, it is not surprising that Canadians have consistently demonstrated a formidable propensity to patronize illegal online sources of copyright material, thus stunting the availability and growth of legal alternatives. To further document this well-established phenomenon, a report released in September 2012 found that, on a per-capita basis, Canadians download more unauthorized music than residents of any other country, and two-and-one-half times as much as Americans.<sup>7</sup>

A 2010 joint study conducted by IPSOS and Oxford Economics for the Motion Picture Association documents the harm inflicted by movie piracy (including online) 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.<sup>8</sup>

These harms persist despite the growing availability of copyrighted material online from legitimate, licensed sources. Entertainment studios are working with new technologies and a multitude of partners, including retailers, cable providers, social networking sites, gaming consoles and websites devoted to online distribution, to bring movies and TV shows to consumers in a myriad of ways, and to cater to every manner of consumer viewing, rental viewing and ad-supported viewing.<sup>9</sup> Today, Canadian consumers have far more choice than ever before in accessing motion pictures and television programs online. But many of them are still choosing the “free” illicit services; and since these Canadian-based pirate sources are equally accessible in countries around the world, the repercussions of the fact that they seem to find safe harbor in Canada – at least until now – are felt in markets around the globe.

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<sup>6</sup>Another leading BitTorrent indexing site with Canadian connections is fenopy.se.

<sup>7</sup>[http://www.huffingtonpost.ca/2012/09/20/music-piracy-canada-top-countries\\_n\\_1899752.html](http://www.huffingtonpost.ca/2012/09/20/music-piracy-canada-top-countries_n_1899752.html).

<sup>8</sup>Canadian 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](http://www.mpa-canada/CMPDA-CAFDE_news-release_ottawa-ON_February-17-2011_EN.pdf).

<sup>9</sup>Many Canadian television networks stream television shows, classic programming and specialty content from their respective websites. The major Canadian Satellite and Cable companies all offer online, on demand streaming and movie rental services which are available exclusively to cable and satellite subscribers. Subscription streaming services like Netflix let users watch an unlimited number of movies and TV shows for a monthly price. In the download-to-own or online rental markets, services like iTunes, Cineplex, Best Buy — Cinemanow, and the major gaming consoles (Microsoft Xbox, Nintendo Wii and Sony Playstation 3) all offer thousands of new release movies and television shows. The Digital Entertainment Content Ecosystem (DECE) consortium of more than 60 studios, retail store and technology firms has also introduced “Ultraviolet,” a digital storage locker for consumer content.

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.

Internet music piracy remains prevalent in Canada and continues to inflict serious harm on the legitimate market for online delivery of music. For example, according to IFPI Recording Industry in Numbers, as of mid-2012 the digital share of total music sales in Canada was 52%, compared with 67% in the U.S. Per capita digital sales in Canada are only two-thirds of those in the United States. Fewer digital music providers have introduced new digital service models in Canada than in the U.S., Europe and Japan, where there is a proliferation of new digital consumer choices.

### **The Piracy Situation in Canada – Offline**

Serious piracy problems persist in Canada's offline marketplace as well. Negative trends are observed across the board. The RCMP, reviewing statistics from 2005 through 2011, reported "a noticeable yearly increase in the number of reported occurrence involving counterfeit and pirated products," with copyrighted works presenting the second largest category of seizures in 2011.<sup>10</sup> A look at the specific problems faced by some of the copyright sectors illuminates this trend.

The Entertainment Software Association (ESA) reports that instances of infringing activity continue at the retail level, with retail specialty stores in Toronto and Vancouver reportedly selling pirate entertainment software products. Circumvention devices remain widespread in Canada, as legislation outlawing their manufacture or sale only came into force last November. These devices, such as mod chips and game copiers, enable the playback of pirated games by bypassing the technological protection measures (TPMs) in game consoles. Most vendors of pirated games also offer circumvention services or devices for sale, while some vendors offer only sales of circumvention technologies and services. Vendors 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 has functioned up to now as a safe haven from which they can redistribute circumvention devices around the world. This unacceptable situation developed as a result of the long-standing failure of Canadian law to explicitly prohibit trafficking in circumvention devices and services. Now that this gap in the legal regime has been filled, vigorous enforcement of the new law will be necessary to clean up the marketplace and make real progress against videogame piracy in Canada.

In 2012, ESA investigations identified a number of instances of retail piracy in Québec, British Columbia, and Ontario involving sales of pirated software to local consumers, many of these tied to websites and/or online classifieds, such as Kijiji and Craigslist, and social networking sites. Some retail outlets are located in malls, including the notorious Pacific Mall. Popular pirated materials sold by these operations included burned optical discs and, increasingly, hard drives and other memory devices containing hundreds of illegal copies of videogames for numerous gaming platforms including the Wii, PlayStation 2, Xbox 360, DS, PSP; modified consoles with hard drives

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<sup>10</sup>RCMP, "2011 Intellectual Property (IP) Crime Statistics," at <http://www.rcmp-grc.gc.ca/fep-pelf/ipr-dpi/report-rapport-eng.htm>.

loaded with up to hundreds of pirated copies of games; and circumvention or modification devices (including installation services).

While sale of counterfeit DVD's was formerly prevalent in shopping malls in the Greater Toronto Area (GTA), flea markets in the Peel Region, neighboring the GTA, have become the predominant place in Canada where the local sale of counterfeit DVD's is significant, according to the Motion Picture Association of America (MPAA). This illicit trade is conducted on a massive scale and in a well-organized fashion throughout the region.

BSA | The Software Alliance (BSA) reports that unlicensed use of software by business end users – especially small and medium-sized enterprises – remains a significant concern. 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.<sup>11</sup>

## The Canadian Enforcement Response

These realities point to serious deficiencies in enforcement against piracy. Historically, much of the problem has been attributable to Canada's inability to advance copyright law reform. The enactment of Bill C-11 in 2012 should help to address the problem. For example, now that Canada's copyright law is modernized to include clear criminal prohibitions against trade in circumvention devices, Canadian law enforcement at least has the legal authority to enforce against local mod chip distributors, retailers, and exporters. How vigorously the law is enforced will determine whether Canada succeeds in attacking the problem at its source, or whether the burden of combating this activity remains unfairly shifted to law enforcement in the countries to whose markets these devices are being exported. Effective enforcement of these new legal provisions will of course entail a learning curve. IIPA therefore recommends that the Canadian government allocate adequate resources to train and educate enforcement personnel (including customs authorities, the RCMP, and prosecutors) about the underlying technologies that will be implicated in enforcement of the new prohibitions.

Similarly, enactment in Bill C-11 of the prohibitions on online services "designed primarily to enable copyright infringement" may provide an effective mechanism for enforcement against some of the most egregious online piracy sites that have found safe haven in Canada until now. However, it is too soon to tell whether this potential will be realized. Furthermore, as detailed below, it is questionable whether Canadian law overall provides legal incentives sufficiently powerful to motivate the inter-industry cooperation that is essential to effectively combat pervasive copyright infringement online. It remains to be seen whether Bill C-11's "notice and notice" provisions, which have not yet come into force, will be enacted within a framework that moves Canada even farther away from its goal of legislation that gives copyright owners the tools they need to combat online content theft.

Entirely apart from the issues addressed in the copyright modernization legislation, Canadian government inaction has effectively handcuffed its law enforcement agencies at the border, a key anti-piracy battlefield. Canadian customs officers in the CBSA lack statutory authority to seize even obviously counterfeit products as they enter Canada. Unless a court order has been previously obtained,<sup>12</sup> only the RCMP can carry out an *ex officio* seizure, and

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<sup>11</sup>BSA | The Software Alliance's 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Canada was 27%, representing a commercial value of unlicensed software of US\$1.14 billion. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA's 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

<sup>12</sup>Court orders, however, can only be obtained upon the filing of an application by the right holder, supported by affidavit evidence, including information regarding the identity of the importer, exporter or vendor; country of origin or export; quantity and value of the infringing goods; estimated date of arrival in Canada; mode of importation; identity of the ship, train or truck used to transport the infringing goods; and (if available) the serial number of the container in which these goods may (...continued)

coordination between the two agencies is generally not effective. As a result, virtually no seizures at the border have occurred, and Canada's borders are effectively wide open to imports of pirate CDs, DVDs or videogames and other infringing materials. CBSA must be given independent authority to act against any suspected pirate or counterfeit imports. Although the Canadian Government has acknowledged this deficiency and has been studying the issue for years, it has failed to introduce the necessary legislative changes.<sup>13</sup>

In any event, not all enforcement problems in Canada can be traced to deficiencies in the law. Even when pirate activity is clearly illegal, Canada's response too often falls short. Both CBSA and RCMP lack dedicated resources – including manpower and data and intelligence management – to address Canada's growing piracy problems. Nor is there progress to report on interagency cooperation. The existing arrangement under which CBSA can refer cases to the RCMP through designated RCMP liaison officers is unwieldy and impractical.<sup>14</sup>

The increased and largely effective law enforcement engagement against sales of pirate DVDs in the GTA malls, beginning in 2009, was a bright spot in Canada's enforcement response to one form of copyright piracy. Raids, seizures and arrests by police were critical to the substantial reduction in the number of illicit vendors operating in the GTA malls. Now that this problem has migrated to flea markets in the Peel Region, however, persuading police agencies there (as well as in the GTA) to treat this organized and widespread manufacturing and distribution of illegal goods as criminal conduct is a challenge. In general, police agencies have responded well to anti-piracy training programs offered by industry, but too often lack the resources and the mandate to properly investigate IP crimes or to prepare the cases for prosecution. On the whole, the Canadian law enforcement commitment to act against copyright piracy, especially on the retail level, remains under-resourced, and too few agencies consider it a strategic or organizational priority.<sup>15</sup>

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. Unfortunately, while this dynamic led to an increased number of law enforcement actions in 2011, there was a dramatic fall-off in actions in 2012, requiring ESA to rely more on cease-and-desist letters for enforcement against sellers of pirated games. With this drop in law enforcement engagement, further progress against game piracy stalled, and sales of illegal copies of games, both in brick-and-mortar and online environments, remained at unacceptable levels. Re-engagement of RCMP in pursuing new instances of game piracy would help recapture the progress made in 2011.

The continued prevalence of pirate product in Canada's retail market also 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. This inconsistency between stated and operational priorities continued in 2012, with RCMP conducting only a handful of criminal copyright investigations. RCMP's 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

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(...continued)

be found. In many instances, a right holder will not have access to this information and the necessity of obtaining the court order is itself unduly burdensome and not designed to prevent pirated and counterfeit imports from entering the country.

<sup>13</sup>Two parliamentary committees that studied this topic in 2007 called explicitly for such amendments to be enacted. See reports from the Standing Committee on Public Safety and National Security, <http://cmte.parl.gc.ca/Content/HOC/committee/391/secu/reports/rp2985081/ securp10/ securp10-e.pdf>, and from the Standing Committee on Industry, Science and Technology, see <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=10476&Lang=1&SourceId=213200>.

<sup>14</sup>The reports of both parliamentary committees called for the government to devote increased resources to, and to require better coordination and information sharing between, CBSA and RCMP.

<sup>15</sup>The Industry, Science and Technology Committee report called for a higher priority for enforcement at the retail level, while the Public Safety and National Security Committee report proposed that knowing possession of counterfeit or pirate goods for purposes of sale be criminalized.

refuse to pursue criminal investigations or initiate prosecutions against retail pirates, copyright owners are left with only civil remedies to pursue, and pirates are not deterred.

The same problems extend to prosecutors and courts in Canada. Few resources are dedicated to prosecutions of piracy cases; prosecutors generally lack specialized training in prosecuting such offenses, 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.<sup>16</sup> This is true even for some recidivists involved with large commercial operations, for which a financial penalty is merely the cost of doing business. For example, almost all criminal cases on which ESA provided support to law enforcement in 2012 resulted in modest penalties such as fines, community service or probation.

Even the RCMP acknowledges that the penalties for engaging in copyright piracy in Canada – usually insignificant fines – are simply insufficient to deter people from engaging in this highly profitable and relatively risk-free crime. As the RCMP told a parliamentary committee in 2007, “[t]he current criminal penalties imposed by courts pose little deterrence. It is not unusual to charge the same groups multiple times for IPR crimes, as they see the fines simply as the cost of doing business.”<sup>17</sup> 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. Incredibly, neither has occurred, and this remedy, which offers material deterrence, has not been imposed.

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

## **COPYRIGHT LEGAL REFORM AND RELATED ISSUES**

On June 29, 2012, Canada marked an important step forward in its years-long effort to modernize its copyright law when it enacted Bill C-11, the Copyright Modernization Act. Most of the bill came into force in November 2012, though with some significant exceptions that have not yet become law. A major stated goal of the copyright reform process in Canada was to enable the country to accede to the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT); enactment of C-11 advances Canada considerably along the path toward that goal, although we note that Canada has yet to ratify these critical treaties, and we look forward to such ratification in the very near future.

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<sup>16</sup>While calling for increased statutory penalties for piracy, and for new remedies such as forfeiture of the proceeds of piracy, the Industry, Science and Technology Committee of the House of Commons also opined that “the justice system should be imposing stiffer penalties for such offences within the limits of current legislation,” and recommended that the government “immediately encourage prosecutors” to do so.

<sup>17</sup>See 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.

<sup>18</sup>Numerous recommendations of the parliamentary committees echo these concerns.

The modernized Canadian copyright law features a number of critical legal tools needed to protect copyright in the digital networked environment and to promote the healthy growth of electronic commerce in creative works. These include comprehensive civil and criminal remedies against trafficking in devices or services aimed at circumventing TPMs that copyright owners use to control access to, or the exercise of exclusive rights in, their works.<sup>19</sup> In addition, new 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.” This provision is potentially an effective tool against some of the sites flagrantly dedicated to copyright theft that have found safe haven in Canada in recent years. Canada deserves commendation for taking these significant steps.

However, in some important areas, Bill C-11 fell short of bringing Canadian law into step with current global standards. It is too soon to tell whether the new statutory tools will actually be used in a way that enables Canada to overcome its reputation as a haven where technologically sophisticated international piracy organizations can operate online with virtual impunity. Furthermore, the legislation left unaddressed the major well-known shortfalls in Canada’s overall enforcement regime against piracy and counterfeiting, shortfalls that have been repeatedly stressed by USTR in prior Special 301 reports.

The following lists some of the major remaining copyright reform topics. The list must not be regarded as exhaustive, however.<sup>20</sup> The list begins with topics on which the recent legislation changed Canadian law but may have fallen short of achieving its full objectives. It then identifies, among the 20 or more new or expanded exceptions to copyright protection featured in Bill C-11, some of those of particular concern, including with respect to compliance with the well-established “three-step test” for acceptable limitations on exclusive rights (see TRIPS Art. 13; WCT Art. 10; WPPT Art. 16). Finally, it addresses ongoing concerns about Canada’s copyright regime that were not directly affected by enactment of Bill C-11.

## A. COPYRIGHT MODERNIZATION ACT ISSUES

(1) **WIPO Treaty Accession and National Treatment.** Full Canadian compliance with the WPPT, and the country’s formal accession to that treaty, are extremely important to the recording industry. Legitimate services for delivering sound recordings online and to mobile devices continue to struggle to obtain a firm foothold in a Canadian marketplace characterized by unsurpassed levels of illegal music downloading and file sharing (see above). WPPT provides the needed minimum standards and the legal points of attachment to set the music industry on the path to a robust legitimate online market in Canada. In this context, it is essential that Canada move immediately to accede to the WPPT.

(2) **Enforcement against online piracy.** As noted, new section 27(2.3), the “enablement” provision, was enacted to help Canadian right holders to combat more effectively the virtual impunity with which online sites and services that enable copyright infringement on a massive scale have been able to operate in Canada. IIPA appreciates that the intent of these new provisions was to ensure that significant Canada-connected sites will be liable for deterrent remedies, including statutory damages, and could be shut down under Canadian law and their copyright theft businesses terminated. It is far too soon to know, however, whether this important positive potential will be realized. Certainly many of these sites continue to operate freely today.

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<sup>19</sup>IIPA remains concerned about section 41.21 of the new law, which authorizes additional exceptions to the TPMs prohibitions to be recognized by regulation. Such an authorization is prudent to allow the law to adapt to unforeseeable technological and market changes, but the provisions as enacted may cross the line from commendable flexibility to debilitating unpredictability. IIPA urges the Canadian Government to exercise caution in utilizing this regulatory exception authority, in order to avoid some of the potential pitfalls IIPA has outlined in previous submissions on this topic.

<sup>20</sup>For a more detailed listing of concerns about Bill C-11, see IIPA’s 2012 Special 301 submission, see <http://www.iipa.com/rbc/2012/2012SPEC301CANADA.PDF>, (but note that some defects identified there were addressed before C-11 was enacted), and its September 2012 submission regarding Canadian participation in the TPP negotiations, [http://www.iipa.com/pdf/2012\\_Sep04\\_IIPA\\_Request\\_to\\_Appear\\_and\\_Testimony\\_on\\_Canada\\_TPP.PDF](http://www.iipa.com/pdf/2012_Sep04_IIPA_Request_to_Appear_and_Testimony_on_Canada_TPP.PDF).

At the same time, other important aspects of Canada's online copyright liability regime continue to fall well short of evolving international best practices. Even after modernization, Canadian law does not provide meaningful incentives for network service providers to cooperate with copyright owners to deal with copyright infringements that take place in the digital network environment. Instead, it provides service providers a series of liability safe harbors that, if read too broadly by the courts, could immunize service providers without providing needed incentives for them to address infringing material under their knowledge and control. For example:

- **Hosting:** Under the new Canadian law, the fact that a party "provides digital memory" for use by others "for the purpose of allowing the telecommunication of a work through the Internet or another digital network" is not thereby liable for infringing activity that it hosts, unless it knows that a court has already adjudged the user's conduct to be infringing, or unless it is part of a service found to have been provided "primarily for the purpose of enabling" infringement. This provision does little to encourage needed cooperation between network service providers and copyright owners. Most other developed countries have put in place a procedure for "notice and takedown" to deal more efficiently with the problem of pirate material being hosted by ISPs. A 2004 decision of Canada's Supreme Court observed that enacting such a procedure would be an "effective remedy" for the problem.<sup>21</sup> But Canada's "modernized" copyright statute does not prescribe such a regime.
- **Linking:** Services meeting the broad definition of "information location tool" in new section 41.27 (but that are not provided primarily for enabling infringement) are provided immunity from liability (other than from narrow injunctions) under specified conditions, so long as they pass along notices of infringement received from right holders. This provides inadequate incentives for more effective action against linking to infringing material.
- **Repeat infringers:** While the new law codifies a version of the current voluntary "notice and notice" system, in which ISPs pass along notices from right holders to ISP subscribers whose accounts have been detected as engaging in unauthorized file sharing of copyrighted works (or other infringing behavior), any value of this "notice and notice" regime is undermined by the lack of any requirement that service providers 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 jeopardizes any deterrent effect the notices could otherwise achieve.<sup>22</sup>

In sum, despite the commendable "enablement" provision, the Copyright Modernization Act risks failing to address effectively the pervasive online piracy that has become an unwelcome feature of the Canadian marketplace. This result seems inconsistent with the stated intentions of the legislation's drafters, and can hardly be said to comply with the mandate of the WIPO Internet Treaties that national law "permit effective action against any act of infringement of rights covered by this Treaty."<sup>23</sup>

(3) **Statutory damages.** Although Canada's law already provides for availability of pre-established damages for copyright infringement, the recent amendments could reduce the effectiveness of the statutory damages option in achieving its goals of full compensation and deterrence in the online environment, where it is compellingly needed to deter large scale infringers. Other than in cases involving services provided primarily to facilitate massive copyright infringement, the new law limits statutory damages to a range of C\$100 - C\$5,000 (US\$100 – US\$5,010) for all infringements carried out by any defendant for "non-commercial purposes," a phrase the law does not define. Even this meager award is available only to the first copyright owner to seek a statutory damage award against a

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<sup>21</sup>*Society of Composers, Authors and Music Publishers of Canada v. Canadian Ass'n. of Internet Providers*, [2004] 2 S.C.R. 427, 2004 SCC 45, available at <http://scc.lexum.umontreal.ca/en/2004/2004scc45/2004scc45.html>.

<sup>22</sup>In any event, as noted above, "notice and notice" also falls short when not coupled with an effective "notice and takedown" system in line with current global norms.

<sup>23</sup>See WCT, Art. 14.2; WPPT, Art. 23.2.

given defendant. All other right holders would be barred from seeking statutory damages; and indeed, statutory damages would be entirely eliminated for all other infringements carried out by that defendant prior to the date that the first copyright owner's lawsuit was filed. These sharp limitations, which can be invoked by institutional as well as individual defendants, especially harm authorized Canadian licensees seeking to defend licensed rights, and thus may prospectively diminish opportunities for all right holders in both established distribution channels and the developing online marketplace.

## B. NEW OR EXPANDED EXCEPTIONS AND LIMITATIONS

Much of Bill C-11 consists of nearly a score of new or expanded exceptions to copyright protection. Many of these raise significant questions, including with regard to Canadian compliance with its obligations under Berne, TRIPS, and the WCT/WPPT to confine exceptions to those that meet the "3-step test." IIPA urges USG to monitor closely the implementation of all these exceptions, with particular attention to the following<sup>24</sup>:

(1) **Fair dealing** (section 29). The Copyright Modernization Act adds "education" to the list of uses (such as research and private study) 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. The concerns are amplified by trends in Canadian jurisprudence under the pre-Act fair dealing statute, as exemplified by some of the decisions in the so-called copyright pentology issued by Canada's Supreme Court in July 2012.<sup>25</sup> These decisions underscored, among other things, that Canadian courts are to treat fair dealing, not as an exception, but as a "user's right," which is to receive a "large and liberal interpretation";<sup>26</sup> that the purposes of the putative user, not those of a commercial or non-commercial intermediary that actually makes the copy and supplies it to the user, are of primary relevance in fair dealing analysis; and that factors such as the availability of a license to make the use, and even the overall impact of widespread unlicensed use on the actual or potential markets for the work, carry much less weight in Canadian law than they do in U.S. fair use jurisprudence.

While this combination of statutory expansion and broader judicial interpretation of fair dealing affects all sectors dependent upon copyright protection in Canada, it may add up to a "perfect storm" for the publishing industry, and especially for publishers seeking to serve the educational market. The ease with which expanded fair dealing and other new or expanded exceptions could potentially be combined to supplant the need for sales or licensing of books, journals, periodicals and other published materials, across a wide swath of the Canadian market, has roiled the sector with uncertainty. 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. Concerns about the fate of the Access Copyright collectively managed licenses for educational institutions provide evidence that these concerns are immediate, not speculative. Although the Access Copyright case in the Supreme Court's pentology directly affected only a marginal aspect of this license — reprographic copying of a few pages per student per year of short excerpts of already purchased supplemental texts by K-12 teachers for use in class instruction — public schools across Canada have concluded that fair dealing now eliminates the need for them to obtain any license from Access Copyright, including for uses such as copying of primary textbooks or of newspaper

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<sup>24</sup>IIPA reiterates that the following list is not exhaustive. Furthermore, the interplay among different exceptions as they are implemented must also be monitored. For instance, many are conditioned on the user's access to a non-infringing copy of a work. But that copy need not be one purchased from the copyright holder or its licensee. It may include a copy made pursuant to another exception. Thus, the potential of a single commercially acquired copy being copied and distributed multiple times, by multiple parties, under the shelter of multiple distinct statutory exceptions, must be taken into account in evaluating the impact of these exceptions on the "normal exploitation" of a work in the commercial marketplace.

<sup>25</sup> Of the five copyright decisions announced on July 12, 2012, the main rulings addressing the issues discussed in this submission were *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, available at <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/9997/index.do?r=AAAAAQALQmVsbCBDYW5hZGEAAAAAAB>, and *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, available at <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/9996/index.do?r=AAAAAQALQmVsbCBDYW5hZGEAAAAAAB>.

<sup>26</sup>For instance, the Supreme Court ruled that that listening to a sample of a popular recording to decide where or not to buy it qualifies as "research," and that classroom discussion of a work qualifies as "private study." This helps explain the trepidation about how broadly Canadian courts will define "education."

articles, course packs, digital copying (including digital storage and distribution through learning management systems), and copying for uses outside the classroom.<sup>27</sup> Similar advice is being provided to post-secondary institutions.<sup>28</sup> Clearly the impact of this amendment, in the current jurisprudential environment, raises serious questions about compliance with the 3-step test.

(2) **Non-commercial user-generated content** (new 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 could substantially undermine the exclusive adaptation right that Canada is obligated under TRIPS and Berne to provide, and provide an unjustifiable safe harbor for commercial disseminators. IIPA notes with concern that the exception applies even when the use of the underlying work violates a contract, exposes a trade secret, or requires circumvention of a TPM.

(3) **Educational exceptions for “publicly available material” online.** New 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 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 expanded fair dealing exceptions (see above), and applicable international standards.

(4) **Temporary copies for technological processes.** New section 30.71 immunizes 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.

### C. ISSUES NOT ADDRESSED in COPYRIGHT MODERNIZATION

(1) **Term of protection.** Although a growing international consensus is well advanced in support of longer terms of copyright protection, Canada’s law remains unchanged on this score. The disparity of term of protection between the U.S. and its largest trading partner will make trade tensions almost inevitable in the future, with respect to a growing body of works that remain protected in one country but not in the other.

(2) **Ex officio authority for border enforcement.** As repeatedly stressed by USTR in its Special 301 reports on Canada, until Canada empowers its Customs officers to act *ex officio* against suspected pirate or counterfeit imports or in-transit materials, its borders remain effectively wide open to such abuses, thus unnecessarily increasing the stress on U.S. border controls. This gap, long acknowledged by Canadian authorities, must be filled as soon as possible.

(3) **Shortfalls in criminal remedies.** Canada’s trademarks law does not include any criminal penalties for a range of counterfeiting violations; nor does its criminal code prohibit manufacture, sale or distribution of fake labels of authenticity, a common feature of organized schemes to traffic illicitly in unauthorized software applications. These omissions adversely impact enforcement efforts, which often rely on these ancillary offenses to attack criminal piracy rings. Numerous legislative reports have documented the need to upgrade these features of Canadian law.

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<sup>27</sup> See <http://archive.constantcontact.com/fs157/1102732265591/archive/1111899765550.html>.

<sup>28</sup> See “Kwantlen Polytechnic University backtracks on Access Copyright agreement,” <http://cupwire.ca/articles/54128> (Jan. 21, 2013).

(4) **Other legal reforms needed to enforcement regime.** The two parliamentary committees that issued reports in 2007 on the problems of counterfeiting and piracy called for a range of additional reforms, including:<sup>29</sup>

- providing the RCMP and the Department of Justice with adequate resources for enforcement against piracy;
- establishing a copyright enforcement policy that effectively targets piracy and counterfeiting; and
- increasing damages and penalties in appropriate circumstances.

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.

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<sup>29</sup>See reports from the Standing Committee on Public Safety and National Security, <http://cmte.parl.gc.ca/Content/HOC/committee/391/secu/reports/rp2985081/securp10/securp10-e.pdf>, and from the Standing Committee on Industry, Science and Technology, see <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=10476&Lang=1&SourceId=213200>.

# COMMONWEALTH OF INDEPENDENT STATES

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2013 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 2013. All but Kazakhstan were on the Watch List in 2012; Kazakhstan was not listed in 2012, and we believe it should be elevated to the Watch List for 2013. 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) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Belarus remain on the Watch List in 2013.

**Priority actions requested to be taken in Belarus in 2013 – Key Legal Reforms:** In 2011, Belarus completely revised its Copyright Law, and (according to an unofficial translation of the law) fixed key provisions including those pertaining to anti-circumvention and copyright management information. Still, there are a number of serious legal deficiencies that are preventing effective enforcement in Belarus. One serious problem is a provision in the 2011 law: Belarus—perhaps inadvertently, subjected the producers’ and performers’ rights of communication to a compulsory license (e.g. a right of remuneration rather than an exclusive right). While rights of remuneration are acceptable—if not favored—with respect to certain communications, such as traditional over-the-air broadcasting or performances of music in establishments, this is not the case with respect to transmissions that are effectively distributions of music to the public. Under the new Copyright Law in Belarus, the right of communication to the public includes the making available right; thus, the right of remuneration operates as a compulsory license for the distribution of music to the public. This is a violation of Belarus’ obligations under the WIPO Performances and Phonograms Treaty (WPPT) (as well as the right of reproduction under the WTO TRIPS Agreement). IIPA urges the U.S. Government to engage with the Government of Belarus to quickly remedy this problem.

The IIPA recommends the following changes to the Government of Belarus as legal reform priorities:

- Amendments to the Criminal Code to provide criminal penalties for first-time IPR violations. Currently, criminal penalties only apply to IPR violations after there has been an administrative violation and an exhaustion of administrative remedies.
- Amendments to the Criminal Code to: (a) adopt a “significant amount of use criteria” calculated on the basis of the price of legitimate product, instead of the existing too high threshold based on “large-scale damage” for IPR crimes; and, (b) lowering the actual amount of the current threshold (in Article 158) to commence liability, which is now BR12.1 million (US\$1,415).
- Amendments to the Criminal Code (or Criminal Procedure Code) to permit the confiscation and destruction of manufacturing equipment used to produce pirated material.
- Amendments to the Criminal Procedure Code to provide the proper *ex officio* authority for police officials to initiate copyright criminal cases and investigations.
- Amendments to the Administrative Code to provide *ex officio* authority to administrative officials to commence investigations and cases. At present, a statement from a rights holder is required to commence an administrative case. The administrative remedies are applicable for violations of copyright and neighboring rights, including acts of illegal retail sale and distribution.
- Amendments to the Customs Code to grant the proper *ex officio* authority to border officials to seize illegal material and to commence their own investigations and criminal cases.
- Amendments to the Civil Code to provide the proper *ex parte* search provisions for effective enforcement against end-user pirates.

- Amendments to the Copyright Law (2011): (a) to provide an exclusive right of making available to the public for performers and producers of sound recordings (currently a right of remuneration) by amending Article 41(1); (b) subjecting all of the exceptions and limitations to the three-step test of Berne Article 9(2); and (c) limiting the scope of rights (to the public performance right) for state accredited collective management organizations by amending Article 48(2).
- Amendments to the Copyright Law (2011) to provide clear protection for pre-existing works and sound recordings. Belarusian officials have insisted that this protection already exists. While this may be correct, and Article 3 of the 2011 law makes international treaty supersede the copyright and neighboring rights law, Articles 21 (works) and 31 (neighboring rights) covering “public domain” treatment, do not clearly specify how (or what) pre-existing works and recordings are protected. It would be helpful to provide statutory clarification by 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 20 years, and still Belarus has not adequately implemented the IPR obligations in that agreement.

In April 2012, the U.S. Trade Representative (USTR) – while retaining Belarus on the Watch List – noted that the U.S. remained “concerned about Belarus’ implementation of the IPR commitments made under the United States-Belarus Trade Relations Agreement of 1993” and that Belarus needed to “improve its copyright legal framework and to fully implement the WIPO Internet Treaties.” The statement additionally noted that although 2011 amendments to the copyright law had been adopted, they would not be put into force absent implementing regulations. The statement further urged Belarus “to provide its enforcement officials with *ex officio* authority to investigate cases, seize infringing goods, and prosecute IPR violations....[and]...provide adequate scope for *ex parte* searches.”

Belarus is a member of all of the relevant IPR treaties, including the Berne Convention (1997), the WIPO Copyright Treaty (WCT) (2002), the WPPT (2002), and the Geneva Phonograms Convention (2003). As noted, Belarus has not adopted basic 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 few 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 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, 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). In 2011, Belarus completely revised its copyright and neighboring rights law (repealing and replacing the 1996 law and the 1998 amendments). It also revised its Civil Code, including those provisions pertaining to intellectual property (copyright). The 2011 Copyright Law does further implement the digital treaties, including covering anti-circumvention devices and services, and the removal or alteration of rights management information (Article 55.2). The remedies for anti-circumvention and rights management information protection include injunctive relief, monetary damages, and seizure of devices. Related Criminal Code provisions (adopted in 2000) apply; these provisions (Article 201) include sanctions of up to five years

imprisonment for repeat offenders of copyright and neighboring rights violations. The new Article 55.2 (in an unofficial translation) does appear 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 (“any action”), and it protects the “removal or alteration” of rights management information. Already noted are the problems with the performers’/producers’ right of communication to the public.

**Enforcement:** With the exception of some civil remedies in the Copyright Law itself, most of the IPR enforcement provisions in Belarus are found in the penal, administrative and civil codes (and other laws, such as the customs laws). Under Article 56 of the Copyright Law (2011), civil penalties for copyright or neighboring rights violations include injunctive relief, damages (including lost profits), seizure and impoundment of infringing copies, as well as statutory penalties of between 10 and 50,000 times the minimum wage; these remedies also apply, according to Article 56.2 to anti-circumvention and rights management information violations. Belarusian officials point to the Civil Code (1998, amended in 2011) as providing additional remedies for IPR violations.

In general, levels of piracy remain extremely high, and enforcement remains virtually inadequate in Belarus. For example, BSA | The Software Alliance (BSA) reports that in 2011, the software piracy rate in Belarus was 87%, representing a commercial value of unlicensed software of US\$87 million.<sup>1</sup> IIPA continues to recommend a focus on legal reforms, as well as on enforcement, including steps against 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 Agreement obligations by adopting the revisions noted above and by improving on-the-ground enforcement.

There are no comprehensive enforcement statistics for 2012. 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.

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<sup>1</sup>BSA | The Software Alliance’s 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Belarus was 87%, representing a commercial value of unlicensed software of US\$87 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

# KAZAKHSTAN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Kazakhstan be placed on the Watch List in 2013.

**Priority actions requested to be taken in Kazakhstan in 2013 – 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 (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (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 amendments to the IPR laws were made in 2011, effective January 12, 2012.

However, additional reforms and enforcement activities are necessary 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 Copyright Law was amended in 1996, and further amended in 2004, 2005, 2007, and 2012. IIPA understands that further revisions to the Customs Code are being contemplated (to provide *ex officio* authority).

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. 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 fully adopt these enforcement revisions.

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 WTO 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 rights holders seeking enforcement at the border, which further weakens the system. IIPA continues to recommend that this registration system be repealed. Kazakhstan, Russia and Belarus joined a Customs Union (in force July 2010). As part of that Customs Union, a complicated duty valuation system based (unfairly) on royalties rather than, as in most countries, on the value of the underlying carrier media (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 2012 in the music, film, or entertainment software industries. The last such notable conviction was in 2008, in a criminal case involving a distributor of pirated software (and pornography). The copyright industries report in recent years that even though there were some additional cases brought to courts, the majority of pirates were not brought to justice due to administrative burdens, prosecutorial inexperience and delays, the low priority given to IPR offenses, and an overall ineffective judicial system. 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.

BSA | The 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. However, piracy is now focused on enterprise 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. BSA reports that in 2011, the software piracy rate in Kazakhstan was 76%, representing a commercial value of unlicensed software of US\$123 million.<sup>2</sup>

In the past, BSA has reported on some raids undertaken against optical disc (CD) and hard-disc software pirates, and, even one against an Internet pirate, as well as the commencement of civil actions. The Criminal Code (Article 184(2)) has had limited impact in some instances, because it has been applied to the manufacturing and sale of illegal copies, but has not extended to contemplated but not completed sales; additionally, many cases have been dismissed or delayed unnecessarily.

In the past several years, a new form of piracy surfaced pertaining to the sale of pirated stickers of the required certificates of authenticity that must be placed on some IP products, such as software. The Government of Kazakhstan needs to address this form of piracy.

While the U.S. copyright industries have been sustaining millions of dollars in losses in Kazakhstan, more than US\$96.8 million in imports to the U.S. from Kazakhstan enjoyed duty-free treatment under the Generalized System of Preferences (GSP) program during the first eleven months of 2012 (and more than US\$93.3 million in 2011). In April 2006, as a result of improvements in Kazakhstan's IPR legal regime, the U.S. Government concluded

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<sup>2</sup>BSA | The Software Alliance's 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Kazakhstan was 76%, representing a commercial value of unlicensed software of US\$123 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA's 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

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.

# TAJIKISTAN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Tajikistan remain on the Watch List in 2013.

**Priority actions requested to be taken in Tajikistan in 2013 – 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. Recent positive steps have included accession to the WIPO Copyright Treaty (WCT) in 2009, the WIPO Performances and Phonograms Treaty (WPPT) in 2011, the Geneva Phonograms Convention (effective, February 26, 2013), and most notably, final approval in December 2012, for membership in the World Trade Organization (WTO) in March 2013, subject to domestic ratification procedures which are expected in 2013.

IIPA recommends the following legal reforms to improve the IPR regime in Tajikistan, and to comply with these treaty obligations:

- Amending the Copyright Law to: (a) comply with the WCT and the WPPT – including basic protections for copyrighted materials on the Internet – an exclusive right of making available to the public for authors (i.e., a communication to the public right consistent with the WCT, Article 8), and for phonogram producers (i.e., consistent with the WPPT, Article 14); protection for the use of technical protection measures applied by rights holders to works and sound recordings; effective legal remedies against those who engage in acts of circumvention or distribute circumvention devices; (b) provide clear protection for pre-existing works and sound recordings for a minimum of 50 years (and preferably, 70 years); and (c) delete the onerous contract regulations.
- Amending the Civil Code to provide the proper *ex parte* search provisions for effective enforcement against end-user pirates.
- Amending the Criminal Code to cover all IPR violations of “works” and “neighboring rights.”
- Amending the Criminal Code to adopt a threshold for a criminal violation calculated on the basis of the price of legitimate product, instead of a threshold based on an undefined “large-scale damage” for IPR crimes, and set that threshold at a low actual level. The current Criminal Code (Article 156) provides for copyright and neighboring rights sanctions, but only where there is “significant harm” to the right holder.
- Amending the Criminal Code to set the penalties for IPR violations to deterrent levels (for example, to 500 times the minimum wage).
- Amending the Criminal Code (or Criminal Procedure Code) to permit the confiscation and destruction of manufacturing equipment used to produce pirated material.
- Amending the Criminal Procedure Code to provide the proper *ex officio* authority for police officials to initiate 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 2012, the U.S. Trade Representative – in retaining Tajikistan on the Watch List – noted the positive step of accession to the WPPT resolving “a longstanding concern for U.S. rights holders” and “steps to implement the Berne Convention...” But as the statement further noted: “Tajikistan should implement its commitments under the 1993 United States-Tajikistan Trade Agreement. Additional concerns remain, including with respect to the lack of *ex officio* authority for border and criminal enforcement officials, and regarding the need for more prosecutions of criminal IPR infringement.”

One remaining issue, even after WCT and WPPT treaty accessions, is that Tajikistan has not clearly indicated its intention to provide protection for pre-existing works and sound recordings, as those 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; the Tajik Government has indicated it would reform its copyright law to fully comply with Berne, but it has not, to our knowledge, done so. There are many deficiencies in the Copyright Law, noted above, including: (1) the over-regulation of the terms and conditions of authors’ contracts; and (2) provisions that provide only for a right of remuneration for producers of sound recordings for the public performance, broadcasting, or communication of a phonogram to the public by cable.

The Customs Code (last revised in 1995) does provide liability for the transfer of illegal goods, including intellectual property material, through the border. A 2002 resolution (No. 185 of the Cabinet of Ministers) established border control rules for goods, including IPR works, and it implemented a customs registry for IPR works requiring a rights holder to file a statement and set of documents for border enforcement. These regulations are cumbersome and an ineffective tool that IIPA recommends should be repealed.

There has not been a single criminal IPR case reported under the existing laws. Nor has there been a single case reported under the Administrative Code. The Administrative Code, last revised in 1999 (Article 158-2), provides levies, fines, and seizure of illegal copyright and neighboring rights material. The copyright industries have no reports concerning enforcement activity in Tajikistan.

On December 10, 2002, the U.S. and Tajik Presidents signed a joint statement reaffirming the relationship between the two countries and “recognizing the importance of . . . the rule of law” as well as pledging to work together on economic and political reforms. IIPA recommends that the Government of Tajikistan affirm this statement by meeting its obligations and amending its relevant IPR laws and engaging in effective enforcement. The U.S. Government and Tajik Government signed a Trade and Investment Framework Agreement (TIFA) on June 1, 2004 to enhance trade and investment between the two countries, and have since held talks in the context of the TIFA, to further improve trade relations.

# TURKMENISTAN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Turkmenistan remain on the Watch List in 2013.

**Priority actions requested to be taken in Turkmenistan in 2013 – Key Legal Reforms:** A positive step undertaken in 2012, was the enactment in January 2012 of a revised Civil Code, Part IV outlining basic provisions for copyright (and patent and trademarks), and the companion adoption of the first-ever Copyright Law (in force, January 20, 2012) providing basic comprehensive copyright and neighboring rights law. However, still missing from the IPR legal regime are enforcement provisions, and basic treaty accessions – to provide protections for American (and other foreign) works and recordings. As a result, the IIPA recommends the following IPR legal reforms in Turkmenistan:

- Adherence to the Berne Convention.
- Adherence to Geneva Phonograms Convention.
- Adherence to the WIPO digital treaties – the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).
- Amendments to the law to fully comply with Berne, the WTO TRIPS Agreement and the WIPO digital treaties (WCT/WPPT), including basic provisions to protect works in the digital era – such as the use of technical protection measures applied by rights holders to works and sound recordings. The law should also clearly protect pre-existing works and sound recordings for a minimum of 50 years (and preferably, 70 years).
- Amending the Civil Code to provide the proper *ex parte* search provisions for effective enforcement against end-user infringers.
- Amending the Criminal Code to raise the penalties for IPR violations to deterrent levels (for example, to 500 times the minimum wage).
- Amending the Criminal Code to adopt a threshold for a criminal violation calculated on the basis of the price of legitimate product, instead of a threshold based on an undefined “large-scale damage” for IPR crimes, and, to set that threshold at a low actual level. Article 153 of the current Criminal Code does provide sanctions for copyright and neighboring rights violations, but only in cases of “significant harm” — a threshold that is too vague, and likely too high in practice to provide any effective enforcement.
- Amending the Criminal Code (or 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. Almost twenty years later, Turkmenistan has not adequately implemented the IPR obligations in that agreement.

In April 2012, the U.S. Trade Representative – in retaining Turkmenistan on the Watch List – noted its progress in adopting a Copyright Law and “by amending its Civil Code to enhance IPR protection.” But, the statement noted: “Turkmenistan should implement its commitments under the 1993 United States-Turkmenistan Trade Agreement, and there continues to be a need for more comprehensive administrative, civil, and criminal procedures for adjudicating IPR cases.” Also, the statement noted the need to provide *ex officio* authority to customs officials, and to join the Berne Convention and the Geneva Phonograms Convention.

**Legal Reform Deficiencies:** Until 2012, Turkmenistan did not have a comprehensive basic copyright and neighboring rights law, instead relying on the Soviet-era Civil Code (Chapter IV). The 2012 revision of that Civil Code (Chapter IV), and of a separate Copyright Law remedied this major IPR legal regime deficiency, but other key reforms, as noted, are still necessary for a digital-era basic IPR regime, especially, for effective enforcement.

IIPA knows of no cases to date where the Criminal Code (Article 153) was used against a copyright pirate. Turkmenistan, by failing to provide a proper legal regime, and lacking any police, prosecutorial, judicial, or border activity, is clearly not providing “adequate and effective” enforcement as required by the 1993 Bilateral Trade Agreement.

After adopting the necessary legal reforms, the Turkmen authorities must, at a minimum, commence police raids and seizures and act to stop the retail distribution of illegal material through the use of administrative and criminal sanctions.

The U.S. Government and Turkmen Government signed a Trade and Investment Framework Agreement (TIFA) on June 1, 2004 to enhance trade and investment between the two countries and have subsequently held talks in the context of the TIFA, to further improve trade relations.

# UZBEKISTAN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Uzbekistan remain on the Watch List in 2013.

**Priority actions requested to be taken in Uzbekistan in 2013 – 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 nineteen years after the 1994 Trade Agreement, some of the most basic protections continue to be denied rights holders in Uzbekistan. For example, since Uzbekistan is still not a member of the Geneva Phonograms Convention or the WPPT, it does not provide any protection or rights for U.S. or other foreign sound recordings. 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 2012, the U.S. Trade Representative, in announcing Uzbekistan’s retention on the Watch List, noted ongoing concerns “regarding the lack of copyright protection for pre-existing works and for U.S. and foreign sound recordings” and the need to join the Berne Convention, the Geneva Phonograms Convention (both obligations of the 1994 United States-Uzbekistan Trade Agreement), and the WIPO Internet Treaties. “Uzbekistan should also increase penalties for IPR violations and ensure that its law enforcement authorities have *ex officio* authority to initiate investigations and enforcement actions.” The statement did also note (with optimism) the establishment of a new Agency for Intellectual Property intended to “improve the enforcement of IPR laws.”

As a result of its ongoing failures to improve its IPR regime, IIPA continues to recommend that the U.S. Government should deny Uzbekistan trade benefits and preferences including its eligibility to participate in the Generalized System of Preferences (GSP) program, because Uzbekistan is not providing the statutorily mandated “adequate and effective” copyright protection and enforcement under its present IPR regime.

**Legal Reform Deficiencies:** The Copyright Law of Uzbekistan was overhauled in 1996 (in force, September 17, 1996), and two additional copyright law amendments were adopted in 2000. Separately, Uzbekistan adopted a Law on Computer Programs and Databases, which was amended in 2002.

In July 2006, Uzbekistan adopted a new Law on Copyright and Related Rights (in force, July 20, 2006).<sup>3</sup> The 2006 Copyright Law was aimed – according to the Government of Uzbekistan – at harmonizing Uzbek law with the requirements of the Berne Convention and WTO TRIPS Agreement, which the government hopes to accede to at

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<sup>3</sup>Note, IIPA bases this filing on an unofficial English translation of the 2006 Copyright Law. In 2006, Uzbekistan also adopted conforming amendments to its Civil Code on copyright and neighboring rights, as well as a decree on royalties for public performances and private copying (IIPA does not have official English translations of these laws/regulations).

some future date. The 2006 law added: a making available right; a right of communication to the public; provisions pertaining to technical protection measures and copyright management information; regulations pertaining to private copying and public performance royalties; and, extensive provisions and regulations involving collective administration (Chapter Four of the law). The Copyright Law could have benefited from more input by copyright rights holders, and as a result, is either missing key provisions (protection for pre-existing works and sound recordings), or has several unclear or incomplete protections, such as, those pertaining to technical protection measures.

In 2005, Uzbekistan adhered to the Berne Convention (effective April 19, 2005). Unfortunately, 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 seven 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 draft bill several years ago to amend the Customs Code would have established a complicated registration system for IPR enforcement at the border. IIPA strongly recommends that Uzbekistan not adopt a border registration plan because it will prove counterproductive to effective enforcement at the border.

**Enforcement:** The U.S. Government and Uzbek Government signed a Trade and Investment Framework Agreement (TIFA) on June 1, 2004 to enhance trade and investment between the two countries. The governments have since held talks, in the context of the TIFA, to further improve trade relations.

During the first eleven months of 2012, US\$595,000 in imports from Uzbekistan enjoyed duty-free treatment under the GSP program (in 2011, the figure was US\$727,000). 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.

# ECUADOR

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR retain Ecuador on the Watch List in 2013.

**Executive Summary:** Ecuador has a long history of piracy of copyrighted works, and the problem has not abated in recent years. While the most commonly reported problems occur in the form of street piracy, rights holders have growing concerns that, as the country's consumers become more online-savvy,<sup>1</sup> the widespread perception that piracy goes unpunished will move to the Internet where illicit activity could grow exponentially. Ecuador needs to take steps to improve its ineffective record on enforcement and reduce piracy levels. Generally, members of the copyright sectors have been unable to maintain a permanent anti-piracy presence in the Ecuador market, let alone active commercial distribution channels, due to the extreme difficulty in obtaining effective criminal and civil enforcement.

### PRIORITY RECOMMENDED ACTIONS FOR ECUADOR IN 2013

- Step up enforcement actions by police and customs officials in shopping malls, where pirate points of sale are established (for example in El Bosque, Espiral, and Naciones Unidas in Quito), including against landlords who turn a blind eye to illegal activity.
- Provide the Ecuadorian Intellectual Property Institute (IEPI) with the necessary budget and police support to conduct raids in a more organized and effective fashion.
- Support an amendment to the Intellectual Property Law to provide enforcement tools to combat Internet piracy.

**Piracy:** The level of piracy in Ecuador worsened in 2012, and pirate music products are being massively sold in shopping malls without any control from police or local authorities. Rights holders have reported that the expansive Bahia Market in Guayaquil, Ecuador sells a wide selection of pirated DVDs, CDs, and software. According to press reports, the piracy problem in the port city of Guayaquil is so expansive that it raises concerns that the burgeoning industry could be funding organized criminal groups.<sup>2</sup>

The recording industry reports that the level of piracy in Ecuador remains steady in 2012 as in previous years, at approximately 90% of the physical and digital market. As a result of the actions developed by the Internal revenue authorities most of the street vendors of pirate products were forced to move out of the streets. In Quito and Guayaquil the availability on the streets of music CD-Rs has been reduced considerably because many illegal points of sale have been fined and removed by tax authorities. However, many of those vendors simply moved their businesses to permanent locations inside shopping malls where they now are openly competing with the legal offer. Examples of this situation are found at the shopping malls "El Bosque," "Naciones Unidas" and "Espiral" in the capital city area. Although the IEPI agents have tried to control the new trend by conducting raids in some of these malls, most of them continue operating with licenses provided by the municipality and knowledge of the landlord.

The Ecuadorian legal physical music market decreased by 28% in 2012 compared to 2011. In turn, digital sales increased by 5%, which is well below the average increase of approximately 50% in the region for the same period.

BSA | The Software Alliance (BSA) reports that the software piracy rate in Ecuador was 68% in 2011 (well above the average rate of 61% across Latin America), representing a commercial value of unlicensed

<sup>1</sup> According to [www.internetworldstats.com](http://www.internetworldstats.com), as of June 2012, 43.8% of Ecuador's population is online.

<sup>2</sup> See, e.g., Patrick Corcoran, [In Sight Crime](http://www.insightcrime.org/news-analysis/ecuador-port-sees-piracy-boom), "Ecuador Port Sees Piracy Boom," (June 21, 2011), available at <http://www.insightcrime.org/news-analysis/ecuador-port-sees-piracy-boom>.



software of US\$92 million.<sup>3</sup> In an online survey of 411 computer users in Ecuador conducted between February and March 2012, nearly three-fourths of those surveyed admitted to acquiring pirated software or software that is not fully licensed to some degree, and 44% admitted to committing these forms of software piracy at least “occasionally.”<sup>4</sup>

**IPR Enforcement:** Ecuador has established special IPR units that conduct investigations and execute seizures of pirated and counterfeit products. But the regime for IPR enforcement, in general, faces great challenges. A few problematic obstacles stand out in Ecuador to date.

Ecuadorian President Correa’s government recently published a decree (#1,322 dated Oct. 5th, 2012) that reduced the IEPI to a small department inside the Secretary of Education, Science, Technology and Innovation (SENESCYT). This means no more administrative enforcement actions on copyright infringement cases, no resources to train officers and no proper attention to collective management of rights matters. Local record producers report that the IEPI completely stopped its anti-piracy actions due to lack of resources, and no longer has the ability to organize raids in Quito and Guayaquil.

Ecuador’s Intellectual Property Act establishes authority with IEPI to initiate actions *ex officio* in cases of intellectual property infringement. However, due to the high costs involved, as well as the lack of resources in the form of personnel, infrastructure and adequate technology, the IEPI cannot take adequate measures to combat piracy effectively in Ecuador. Since the IEPI gained this authority, it has been reported that the office has initiated actions against a number of stores dedicated to the unauthorized sale of CDs and DVDs, issuing hefty fines subject to criminal action for non-payment. Since those actions began, however, the Ecuadorian Association of Audiovisual Product Traders has brought a constitutional claim against the IEPI on the grounds that the initiation of such processes against informal traders violates Article 325 of the Constitution. Part of the argument being made on behalf of the pirate optical disk shops appears to be that the activity supports local well-being in areas of extreme economic hardship. In response to the claim, Andrés Ycaza, IEPI president, has said that actions will be limited to formal stores in Quito and Guayaquil, where piracy is “not a necessity” but simply a way to make money. While the IEPI’s resolve is appreciated, it is worrying to consider that, in a country plagued by organized crime, the lack of economic opportunities could serve to legitimize the harmful business of piracy.

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<sup>3</sup>BSA | The Software Alliance’s 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

<sup>4</sup>See [http://portal.bsa.org/globalpiracy2011/downloads/opinionsurvey/survey\\_ecuador.pdf](http://portal.bsa.org/globalpiracy2011/downloads/opinionsurvey/survey_ecuador.pdf).

# EGYPT

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

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

**Executive Summary:** IIPA recognizes the ongoing political situation in Egypt warrants attention, and hopes that as the situation stabilizes the government can get back to the important work of improving the business climate for creative industries in the country. With legitimate copyright businesses launching in the Middle East (along with phone offerings such as the iPhone5), IIPA sincerely hopes the Egyptian government will work to ensure an adequate legal and enforcement framework exists to deal with piracy.<sup>2</sup> Unfortunately, local Egyptian and U.S. right holders remain hampered by piracy and other barriers.<sup>3</sup> Photocopy and print piracy, enterprise end-user piracy of software, and piracy of music, software, games, and movies, continued to cause losses to copyright owners in 2012. Unfortunately, the situation worsened in 2012 due to the current political instability and poor economic climate and outlook. This said, there are some bright spots upon which momentum must be built. The establishment of the Economic Courts in 2008 was a positive development, as decisions have been stronger than the judgments of the previous commercial courts. Nevertheless, trial procedures need to be quicker and sanctions stronger to deter piracy and have the result of reduced piracy levels. The shift in jurisdiction for software to the Ministry of Communications and Information Technology's "Information Technology Industry Development Agency" (ITIDA) has also been positive, and relations with ITIDA remain good, but results of any enforcement actions (increasingly sporadic) have been mostly non-deterrent fines. The Ministry of Culture, which still has enforcement purview over books, music, and motion pictures, remains largely inactive. One bright spot in 2012 is the improved relationships with the new management of the Copyrights & Artistic Works Investigation Unit of the Ministry of Interior (MOI). We understand this Unit takes *ex officio* actions against various types of copyright piracy, including book, film, software, and cyber café piracy, which is sorely needed in a climate in which it is difficult for right holders to operate.

The United States and Egypt signed a Trade and Investment Framework Agreement on July 1, 1999, and there has been movement toward deepening the trade relationship; IP has continued to be one of the key issues for engagement. In late January 2012, USTR 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 of the partnership including "protecting intellectual property rights and promoting innovation."<sup>4</sup> 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.

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<sup>1</sup>For more details on Egypt's Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2013SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

<sup>2</sup>Noelle Manalastas, *Apple Opens iTunes Store in Middle East, Unveils iPhone 5 Release Date*, Al Arabiya News, December 5, 2012, at <http://english.alarabiya.net/articles/2012/12/06/253621.html>.

<sup>3</sup>The experiences of authors such as Alaa al-Aswany, 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 to the perils of piracy for local creators. See Abdallah, *Alaa El Aswany*, Egypt Today, August 2004, Volume No. 30 Issue 02.

<sup>4</sup>United 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>.



## **PRIORITY ACTIONS REQUESTED IN 2013**

### **Enforcement**

- Draw upon recent success of MOI IP Unit to build an enforcement unit within ITIDA to act to reduce software piracy.
- Continue nurturing “Economic Courts” with specialized IP judges, emphasizing speed and deterrent sentencing in piracy cases, and take steps to develop core of specialized IP prosecutors and judges (including training).
- Tackle book and journal piracy, both illegal reprints and photocopying, by taking sustained enforcement actions against pirate production and distribution, and ensuring universities adopt appropriate use and copyright policies for students and faculty.
- 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.
- Take a more active approach to legalization of software usage by publicly-owned companies, including easing rules related to obtaining evidence with regard to the illegal practices of such companies.

### **Legislation and Market Access**

- Issue draft Border Measures Regulations to give Customs *ex officio* right to detain pirated and counterfeit goods, and lower the onerous official fees required of right holders to seize suspected pirated and counterfeit products.
- Amend the law to provide that enforcement authorities shall destroy pirated and counterfeit products.
- Amend copyright law and implementing decree to cure TRIPS deficiencies, resolve ambiguities, and fully implement and join WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).
- Adopt pre-established (statutory) damages to address the problem of low compensatory damages.
- Adopt rules easing the obtaining of an *ex parte* civil search (a TRIPS requirement).
- Launch and execute a public awareness campaign on the importance of copyright protection, the dangers of piracy, and the consequences of engaging in piracy, including end-user software piracy.
- Launch additional awareness sessions for technical enforcement authorities, prosecutors and judiciary so they are each fully aware of the importance of their roles in creating a strong IP system in Egypt.
- Ease onerous market access restrictions which close the Egyptian market to legitimate copyright companies.

## **PIRACY UPDATES IN EGYPT**

Previous reports have discussed the piracy challenges faced in Egypt in depth. The following sections provide brief updates to the piracy situation in Egypt.

**Software Piracy:** The unauthorized use of software by enterprises and retail piracy continue to cause serious harm to the software and IT industries in Egypt. The software piracy rate in 2011 was 61%, an increase over the previous several years, representing a commercial value of unlicensed software in the country of \$172 million.<sup>5</sup> Piracy is prevalent among publicly owned companies, small and medium enterprises (SMEs), especially private sector medical clinics, law offices, auditing firms, etc., and consumers. Reducing piracy in Egypt would bring positive benefits to the Egyptian economy. A study released in 2010 by IDC and BSA found that reducing the PC software piracy rate in Egypt by 10% over four years would generate US\$254 million in GDP, US\$33 million in additional tax

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<sup>5</sup>BSA | The Software Alliance’s 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Egypt was 61%, representing a commercial value of unlicensed software of US\$172 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

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.<sup>6</sup>

**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 profit from unauthorized printing of English language higher-education textbooks, English language teaching (ELT) materials, best-sellers, and books in translation, which are also being exported to Northern Africa. Local Egyptian publishers, Egyptian authors, and Egyptian distributors are as negatively affected as foreign publishers. 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.

**Retail Piracy Remains Severe, Including Some Imports:** Physical piracy in retail shops and street stalls has been a major problem in recent years in most major cities in Egypt, including Cairo, Alexandria, Giza, Mansoura, and Asyut. Retail establishments selling computers have reportedly offered illegal software and games. Imports of pirate software and imports of counterfeited trademark labels such as hard disks, computer spare parts, and mobile accessories have been detected, which are then transshipped into other markets in the Middle East. China is a source for many counterfeit and pirated goods detected in Egypt. Resellers of pirate software have advertised these illegal products in trade magazines. 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.

**Pirate DVD Channels/Rogue Stations:** The motion picture industry has reported previously 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) has indicated previously that 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 Egyptian 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.

## **ENFORCEMENT UPDATES IN EGYPT**

**ITIDA Needs to Become More Effective and Active Unit in Addressing Piracy:** The industries have noted that, notwithstanding positive relationships with ITIDA, they have been less proactive in the past year in addressing piracy concerns. ITIDA has administrative enforcement authority and thus can do much good in wielding its authority in order to deter piracy. As a general rule, private investigations in Egypt are prohibited, which makes it incumbent on ITIDA to run normal checks of the market and address piracy effectively through administrative actions, seizure and destruction of pirated goods, materials and implements used in the production or dissemination of piracy, and deterrent level administrative remedies actually imposed.

**Need Effective Approaches to Address Book Piracy:** Enforcement against print piracy has been inconsistent over the years, although publishers have reported some good cooperation in pursuing isolated cases through the Copyrights & Artistic Works Investigation Unit of the MOI in Cairo. Most enforcement actions occur on the basis of complaints, not *ex officio* actions. IIPA is aware of the Egyptian government's report indicating that the "Contact Point Organization for IPR has contacted all universities and higher academies, requesting them to provide copies of the original books circulated in their studies."<sup>7</sup> The government further notes, "[t]hese copies are used to compare between the original and seized items to detect the existence of piracy," and noted that many universities

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<sup>6</sup>BSA 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](http://portal.bsa.org/piracyimpact2010/cps/cp_egypt_english.pdf).

<sup>7</sup>Submission from the Government of Egypt to the Government of the U.S. Concerning the USTR Special 301 Report of the Year 2012, February 27, 2012 (on file with IIPA).

welcomed this. Yet, legalization efforts are spotty. 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 encourage universities to adopt appropriate use and copyright policies to ensure that only legitimate or original copies of books are used in the university setting. At present, public state-funded universities are taking no responsibility for ensuring that on-campus stores, presumably subject to a lease agreement with the university, do 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 to sell the pirate copies to students.

In addition to book piracy in the university setting, piracy of school books (Elhi) is also of significant concern to publishers. While most school books are published and supplied by the Ministry of Education, international and local publishers are authorized to supply English Language Teaching (ELT) books (subject to MOE approval). The ELT books are sold to private schools and the experimental schools (state schools that teach math and science in English). Unfortunately, pirate enterprises are printing unauthorized copies of the best-selling ELT titles and selling directly to the school. As the pirates have invested nothing in the development and production of the ELT materials, they of course sell below market price (already reduced to serve the Egyptian market) to the private schools, which unfortunately, have not seen fit to refuse to do business with the pirates. Publishers have sought assistance from the MOE in addressing this specific issue, but the MOE has been less cooperative.

**Software Enforcement Remains Spotty in Egypt Due to Lack of ITIDA Enforcement Unit:** The software industry notes good relationships with the Copyrights & Artistic Works Investigation Unit of MOI in carrying out raids, including *ex officio* raids, against retail establishments that offer pirated software and corporations using unlicensed software. While relations with ITIDA are good, the lack of an enforcement unit within ITIDA has hindered its ability to take meaningful actions to address software piracy. 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 (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 there are visibly large amounts of piracy or counterfeiting (hence, Internet cases and enterprise end-user piracy cases often get short shrift). A new hurdle emerging to enforcement in Egypt is that suspects are claiming their use of illegal software is for “personal use.” Enterprises should not be able to use this excuse to escape enforcement under the law, since the nature of enterprise end-user piracy is the unfair enrichment obtained by using software without paying for it, which provides the user with an unfair commercial advantage over those who pay for their software.

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.

**Establishment of Economic Courts a Welcome Development, Must Avoid Onerous Burdens:** 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.”<sup>8</sup> Industry reports that some of the more recent decisions of the Economic Courts have been stronger than those under the commercial courts previously. The Egyptian government’s 2009 Special 301 Submission reported five criminal case results from 2008-09, four involving “imprisonment of infringers,” which the Submission notes “constitutes a new trend in Egypt’s judicial efforts in deterring piracy.”<sup>9</sup> The 2012 submission of the Egyptian government notes 388 copyright cases between July 1, 2010 and June 30, 2011, and 273 cases between July 1, 2011 and December 31, 2011. However, no results of these cases are discussed, and it is unclear whether the case lists overlap (i.e., some of the 388 remain pending and are therefore included in the 273). Right holders note that in general results in court cases are non-deterrent, and look for improvements with regard to calculations of damages and court costs/attorneys’ fees in civil cases, and the need for deterrent sentences including imprisonment and fines in criminal cases. They note that prison sentences are usually suspended during the Appellate Court proceedings. Courts should not impose bureaucratic documentary hurdles to effective judicial enforcement, or other hurdles which could, if allowed to deny protection altogether, amount to inconsistencies with Egypt’s current international obligations.<sup>10</sup> Problems in the past have included the Egyptian government accepting false licenses to deny claims by the legitimate right holder of unauthorized distribution.<sup>11</sup> It would also help right holders if the new courts shared court decisions in a more transparent manner by publishing them expeditiously.

### **Police and Courts Must Adjust to Address Internet Piracy Cases and Deal with Electronic Evidence:**

Emerging issues include dealing with electronic evidence and with Internet piracy cases. IIPA members report a general lack of police interest in piracy cases unless there are visibly large amounts of piracy or counterfeiting. As a result of this, it has been very difficult to raise significant interest in Internet cases. A recent hurdle reported could hinder efforts to address Internet piracy in Egypt or, indeed, any case involving electronic evidence. Apparently the Economic Courts are taking the position that unless an authorized certificate is obtained from ITIDA confirming the

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<sup>8</sup>See Arab Republic of Egypt (Mona El Garf, Advisor, Minister of Trade and Industry), *USTR Section 301 Report for the Year 2009 Submission by the Arab Republic of Egypt*, February 2009, submitted to regulations.gov (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.”

<sup>9</sup>The cases listed are:

- “Case No.14 for the year 2009, in which the court gave a sentence of imprison[ment] for 6 months.”
- “Case No. 9172 for the year 2008 in which the court gave a sentence of imprison[ment] of a year plus a fine of 5000 Egyptian Pounds [US\$905].”
- “Case No.14532 for the year 2008, in which the court gave a fine of 15,000 Egyptian Pounds in addition to a sentence of pre-civil remedy of 5001 Egyptian Pounds[US\$905].”
- “Case No.9171 for the year 2008 in which the court gave a sentence of imprison[ment] for 3 months plus a fine of 5000 Egyptian Pounds [US\$905].”
- “Case No. 20039 for the year 2008 in which the court gave sentence of imprison[ment] for 6 months plus a fine of 5000 Egyptian Pounds [US\$905].”

<sup>10</sup>In several infringement cases in 2008 and 2009, ITIDA has noted that a victim company’s failure to file formal deposit copies of the works involved and other documentation in line with Article 184 of the Copyright Law of Egypt is inconsistent with Egyptian law. As has been noted in previous IIPA submissions (and as discussed below), Article 184 outlines onerous deposit requirements, whereupon failure to deposit can lead to imposition of administrative penalties. In these cases, it is apparent that ITIDA would have preferred for the victim/right 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. The Egyptian government wrote in its February 2009 Special 301 Submission,

“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. See Government of Egypt, 2009 *Section 301 Report*, *supra* note 8.

<sup>11</sup>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.

authenticity of an email address or website IP address, the document is deemed inadmissible as evidence. It is critical that electronic evidence be admitted in order to effectively address copyright cases in the modern age.

## **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**

**Legal Framework Should be Established to Protect Authors and Artists in the Online Space:** As of December 2012, Egypt had 22 million Internet users.<sup>12</sup> Egypt also has more than 1.8 million fixed broadband subscriptions as of the end of 2011.<sup>13</sup> The music industry in Egypt has suffered the ill effects of unlawful distribution models deployed on the Internet in Egypt. These models include illegally hosted content, deep linking sites, streaming sites, P2P services, BitTorrent, and auction sites which are being used for infringement of copyright.<sup>14</sup> The government has reportedly worked with ISPs on a code of ethical conduct to encourage ISPs to take affirmative action against cybercrimes, child pornography, and IP online crimes; however, the latest Special 301 report from the Egyptian government makes no mention of progress toward this laudable end. IIPA members have been encouraged in recent years 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.

**Customs Measures to Deal With Unauthorized Imports and Exports on an *Ex Officio* Basis Would Be Welcome Improvement:** Egypt's 2009 and 2012 Submissions to USTR regarding the Special 301 process indicated that Egyptian Customs is putting into place a mechanism to deal with infringing imports and exports.<sup>15</sup> The 2012 Submission notes,

“[t]he Ministry of Industry and Foreign Trade is currently amending Chapter (9) of the Executive Regulations of the Import/Export Law, which includes the provisions of the IP Border Measures. The draft border regulations addresses the destruction of illicit counterfeited products, in addition to

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<sup>12</sup>*Egypt's Internet Users Increase by 30 Pct, Facebook Users Reach 12 Mln: Report*, Ahram Online, Thursday 20 Dec 2012, at <http://english.ahram.org.eg/NewsContent/3/12/60982/Business/Economy/Egypt-Internet-users-increase-by-pct-Facebook-u.aspx> (citing Madar for Research and Development *Information and Communications Technology Report*).

<sup>13</sup>International Telecommunication Union, Fixed Broadband Subscriptions 2000-2011, at <http://www.itu.int/ITU-D/ict/statistics/material/excel/Fixed%20broadband%202000-2011.xls>, accessed on January 10, 2013.

<sup>14</sup>The 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.

<sup>15</sup>Specifically, the 2009 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.” See Government of Egypt, 2009 *Section 301 Report*, *supra* note 8.

cutting down the required payment needed as a guarantee by the IPR right holder as a condition to file his complaint to the competent authorities. The draft provides customs officials with the authority to act upon their own initiative (Ex Officio).”

IIPA welcomes the initiative of the government to try and effectively stop pirate imports and exports, and looks forward to the issuance of these amendments to the Executive Regulations of the Import/Export Law, and their implementation in practice.

**Cairo Declaration on Cybercrime:** Computer-based infringements are on the rise in Egypt, whether Internet-based piracy or end-user piracy of software. Thus it is crucial that the government of Egypt deal with such copyright infringement as a species of cybercrime. In November 2007, Egypt hosted an Arab regional conference on cybercrime convened by the Council of Europe, at which 400 participants from around the region and other countries discussed using the COE Cybercrime Convention as a model to guide the development of national legislation on cybercrime.<sup>16</sup> One of the end results was the adoption of the Cairo Declaration on Cybercrime, dated November 27, 2007. IIPA hopes that the Declaration will result in Egypt leading the way to adopt legislation to meet the requirements of the COE Cybercrime Convention (2001).<sup>17</sup> The Declaration notes that “[t]he Budapest Convention (2001) on Cybercrime is recognized as the global guideline for the development of cybercrime legislation ... Countries of the Arab region are encouraged to make use of this model when preparing substantive and procedural laws,” 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.”

**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 did not 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:

- **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

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<sup>16</sup>The Conference was held under the auspices of HE Prof. Dr. Ahmed Fathy Sorour, Speaker of Parliament of Egypt, and opened by HE Dr. Tarek Kamel, Minister of Communication and Information Technology. It was organized by the Egyptian Association for the Prevention of Information and Internet Crimes and supported by ITIDA, the Council of Europe, the United Nations Office on Drugs and Crime, Microsoft, Ain Shams University, IRIS, EASCIA and other partners.

<sup>17</sup>Article 10 of the COE Cybercrime Convention (2001) (“Offences related to infringements of copyright and related rights”) provides,

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

2 Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the infringement of related rights, as defined under the law of that Party, pursuant to the obligations it has undertaken under the 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.

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 Copyright Law should be amended to ensure registration and deposit are voluntary.

- **Criminal Remedies Are 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\$750 to \$1,500). 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 a provision for adequate compensatory damages, as required by Article 45 of TRIPS. Only Article 179 of the Copyright Law 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.<sup>18</sup>
- **Ex Parte Civil Searches:** Article 179 of the Copyright Law does not expressly provide judicial authorities with authority to “adopt provisional measures *inaudita altera parte* (without notice to the defendant) where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed,” as required by TRIPS Article 50. The copyright industries are considering a test in the courts, but in the meantime, the law should be amended to expressly provide for the availability of this vital measure.

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<sup>18</sup>The following suggested text would provide a TRIPS-compliant framework for compensatory damages (with a placeholder for a proper determination of the appropriate statutory damages to make available):

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; or (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.

- **Remedy as to “Materials and Implements”:** Article 179(3) in the Copyright Law 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.<sup>19</sup>
- **Ambiguous Protection for Pre-Existing Works/Sound Recordings:** There is no provision in the Copyright Law ensuring that pre-existing works and the objects of neighboring rights (including sound recordings) receive full retroactive protection as required under TRIPS Articles 9.1 and 14, and Berne Article 18. Even though we understand that the government of Egypt takes the position that TRIPS and Berne are self-executing in Egypt, the absence of a provision for full retroactivity for TRIPS/Berne terms of protection may lead to confusion. Therefore, it would be highly preferable for Egypt to include an express provision for full (TRIPS- and Berne-compatible) retroactivity for all subject matter under the law.<sup>20</sup>
- **Requirement of Translation into Arabic:** Section 148 of the Copyright Law 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 Copyright Law contains a compulsory license for copying and translating works. It is not limited to literary works in printed form, and apparently extends to computer programs and audiovisual works. Such a compulsory license is contrary to international law and would be devastating to the copyright industries if the Egyptian government allows for such practices. It must be fixed or deleted altogether. The Implementing Decree (Articles 4 and 5) failed to resolve this issue and leaves in place a Berne- and TRIPS-incompatible compulsory license.

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<sup>19</sup>The following formulation might, for example, be appropriate:

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

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

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

- **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 Copyright Law 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 Copyright Law 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 Copyright Law. The Article also provides that “amendment in translation shall not be regarded as infringement, unless the translator fails to indicate points of deletion or change, or abuses the reputation and status of the author.” This would violate Berne Article 8, as it would impinge on an author’s exclusive translation right.
- **Performers’ Moral Rights Provision:** In Article 155(1), the performer’s right of attribution should permit the omission of the performer’s name, if such is dictated by the manner of the use of the performance, and Article 155(2) should qualify the kinds of changes made by a right holder that would be objectionable (i.e., changes that would be prejudicial to the performers’ reputation), and provide that it is not prejudicial to the performer for right holders to make modifications consistent with the normal exploitation of a performance in the course of a use authorized by the performer.
- **Exclusive Rights for Producers of Audiovisual Works:** Article 177(5) clearly should not apply to sound recordings and therefore the word “audio” should be stricken from this article. Also, the panoply of exclusive rights for producers of audiovisual works is unclear. The producer is defined as “the natural or legal entity who produces the ... audiovisual work, and undertakes the responsibility of such achievement” [Article 138(11)]. Article 177(5) provides that the producer “shall be considered as representative of the authors and successors in exploiting this work, without prejudice to the rights of the author of literary or musical works, unless otherwise agreed upon in writing,” and “the producer shall be considered as the publisher, and will have the rights of the publisher ....” Egypt should reverse this presumption, such that the producer of audiovisual works shall be presumed to have the exploitation rights unless otherwise agreed upon in writing.<sup>21</sup> The producer of an audiovisual work should have the ability to exercise all the economic rights in that work without the further consent of the authors.

The Implementing Decree to the 2002 Law 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 could, if abused, have the unintended but certain

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<sup>21</sup>The simplest formulation of the producer’s rights would be as follows: “Unless otherwise agreed upon in writing, the producer shall be entitled to exercise all the economic rights in relation to the work and copies thereof.”

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

## **GENERALIZED SYSTEM OF PREFERENCES**

Egypt enjoys preferential trade benefits under the Generalized System of Preferences trade program. Among the criteria the President must take into account in determining whether a country should continue to be designated as a GSP beneficiary country are “the extent to which such country is providing adequate and effective protection of intellectual property rights,” and “the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets ... of such country.” 19 USC 2462(c)(4) and (5). During the first eleven months of 2012, nearly US\$55.4 million in imports to the U.S. from Egypt enjoyed duty-free treatment under the GSP Program, or more than 1.9% of Egypt’s entire imports into the U.S.<sup>22</sup> The Egyptian government needs to continue to endeavor to meet the adequate and effective test under the statute to remain eligible to receive favorable treatment under the GSP program.

## **TRAINING AND PUBLIC AWARENESS**

Training and public awareness remains an important part of sensitizing officials to the harms of piracy and educating the public as to the positive effects of protecting intellectual property in Egypt. In 2012, the U.S. Chamber of Commerce in Egypt held several meetings with various business owners and representatives from the U.S. State Department in an attempt to address IPR issues. Software companies have engaged by 1) providing product identification training for the Copyright & Artistic Works Investigation Unit of MOI and ITIDA officials during April and May, 2012; 2) participating in “Consumer Action Day,” in which journalists gave extensive coverage on IPR-related issues to increase awareness for end-users of copyrighted products; and 3) participating in IPR awareness sessions for students and universities during February and March 2012, and for software partners in October 2012. In 2013, software companies plan to provide copyright training, in the form of product identification training, for the Copyright & Artistic Works Investigation Unit of MOI and ITIDA in March 2013.

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<sup>22</sup>During 2011, more than US\$48.6 million in imports to the U.S. from Egypt enjoyed duty-free treatment under the GSP Program, or more than 2.5% of Egypt’s entire imports into the U.S.

# GREECE

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Greece remain on the Watch List in 2013.<sup>1</sup>

**Executive Summary:** There is very little news to report of any change in the environment for copyright piracy in Greece over the past year. Several years have passed since the Government of Greece organized its IPR enforcement efforts under a coherent plan with top-level leadership. But there is little to show for this. Greek police forces are a bright spot in efforts to enforce against infringement, but these authorities lack needed resources in difficult economic times. 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. In a story of relative, if fleeting, success, several groups within the copyright sector in Greece came together in a civil case in 2011, which in May 2012 resulted in a judicial order to block access to major Greek infringing linking websites, *ellinadiko.com* and *music-bazaar.com*. However, the blocks were in the end not implemented. Furthermore, many attempts to combat illegal file-sharing continue to be frustrated by data protection laws that impede investigations and enforcement actions. IIPA urges the U.S. Government to engage with the Government of Greece to encourage that it resumes and strengthens the efforts of the Coordination Committee for Monitoring and Coordinating IPR and reinstates and implements a Greek national IPR enforcement strategy, efforts that have been abandoned since 2009.

### PRIORITY RECOMMENDED ACTIONS FOR GREECE IN 2013

- Introduce clear incentives for ISPs to cooperate with rights holders, both regarding hosted and non-hosted content.
- 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.
- 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 Authority for the Prosecution of Financial Crimes (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, 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 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.

<sup>1</sup>For more details on Greece's Special 301 history, see IIPA's "History" appendix to this filing, at <http://www.iipa.com/pdf/2013SPEC301HISTORICALCHART.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/2013SPEC301COVERLETTER.pdf>.



## **COPYRIGHT PIRACY IN GREECE**

End-user piracy of software in corporate settings is a growing problem in Greece. Some raids against the administrators of Greece's most popular illegal websites (including torrent and forum sites) resulted temporarily in a lower rate of illegal downloading, but the absence of a framework that encourages active cooperation amongst the various actors in the Internet ecosystem has sadly undermined any chance that there will be a lasting impact, and online piracy continues unabated. Rights holders are aware of approximately 75 websites providing access to infringing content in Greece today. Peer-to-peer (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. Many sites continue to engage in illegal subtitling, allowing Greek Internet users to look to foreign online sources for pirated movies.

**Software piracy:** BSA | The Software Alliance (BSA) reports that the software piracy rate in Greece is now above 60% and has risen over the past few years.<sup>2</sup> The high commercial value of software piracy in Greece (estimated at \$343 million in 2011) translates to fewer job opportunities and decreased revenues for local IT businesses. Local IT businesses have faced huge financial problems in recent years, in addition to the effects of the economic crisis that hit Greece. While unlicensed software use by enterprises ("enterprise end-user piracy") continues to be a serious problem, Internet piracy (such as illegal downloading, P2P bit torrents, business-to-business piracy, and through websites that function as cyber lockers etc.) 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. Piracy of sound recordings and music in Greece represents around 70% for both international and local repertoire. The legitimate market for physical copies of recorded music remains in disarray. 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 severe economic conditions in Greece have affected all sectors of local industry, making it difficult to quantify the direct impact of piracy on the audiovisual industry. But there is no doubt that the legitimate audiovisual market has shrunken considerably in Greece, and Internet piracy creates a very difficult environment for operations in all parts of the film and television distribution chain, from theatrical exhibition to video, and 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). Some successful raids against the administrators of the most popular illegal websites (including torrent and forum sites) have resulted in a lower rate of illegal downloading. However, many sites continue to engage in illegal subtitling, allowing Greek Internet users to look to foreign online sources for pirated movies.

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<sup>2</sup>BSA | The Software Alliance's 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Greece was 61%, representing a commercial value of unlicensed software of US\$343 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA's 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

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.

## **COPYRIGHT ENFORCEMENT IN GREECE**

In the absence of a comprehensive mechanism for cooperation among rights holders and Internet service providers (ISPs) to combat online piracy, copyright holders can only work through the courts to seek remedies against known infringing websites in Greece. Enforcement results have proven to be possible, but the enforcement tools available to rights holders are arduous and often inefficient – and therefore insufficient to effectively address the piracy problem. Working together, the local author’s music collecting society (AEPI), the audiovisual content protection organization (EPOE), the organization of script writers and film directors (Athina), and the local recording industry affiliate (Grammo) launched an action before the civil court of Athens under Article 8(3) of the EU Copyright Directive, against 11 Greek ISPs seeking an order blocking access to two infamous Greek linking websites ([www.ellinadiko.com](http://www.ellinadiko.com) and [www.musick-bazaar.com](http://www.musick-bazaar.com)). The ISPs requested an adjournment at the initial hearing in May 2011. A further hearing was held on November 7, 2011, and the interim injunction was eventually granted by the Court on May 16, 2012, ordering all 11 ISPs to block access to the website in question. The blocks were never implemented as the site [www.ellinadiko.com](http://www.ellinadiko.com) went offline shortly after the hearing, and [www.musick-bazaar.com](http://www.musick-bazaar.com) changed its IP address rendering the blocking order of the specific IP address futile. The case demonstrates that while the system is capable of responding to Internet piracy, it is not perfect and moves at a snail’s pace relative to the rapid developments online.

The copyright industries report very positive working relationships with the Greek police, despite a need for more resources and action in key enforcement divisions. BSA reports that, in 2012, the software industries continued to have excellent relationships with SDOE. However, in 2012, SDOE conducted only a small number of raids (13 raids against small and medium companies in Athens and Thessaloniki) to tackle the size of the software piracy problem in the country. This could be attributed to Greece’s ongoing political instability, which also had an impact on the leadership of SDOE, where the Head of SDOE changed four times in 2012. SDOE also lacks trained personnel, with its personnel dedicated to software piracy investigations having only basic IT knowledge. Unfortunately, the new IPR Department of SDOE has not reached into other areas of piracy as well. Many of the historical challenges 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. Compounding these concerns, rights holders

are also challenged by the fact that no legislation in Greece permits the disclosure of identifying information in the case of online copyright theft.

Rather than coordinating and allocating additional enforcement authorities to increase expertise and effectiveness, resources are being cut back. A Cyber Crime Unit in Thessaloniki recently closed, and both the Police and the Tax Police (SDOE) in Greece's central divisions lack needed resources. Several years have passed since the Government of Greece organized its IPR enforcement efforts under a coherent plan with top-level leadership. Prosecutors must place greater priority on copyright crimes, courts need to facilitate speedier cases with deterrent sentences, and government leaders need to establish the tools for ISPs and rights holders to cooperate against Internet piracy.

**Comprehensive Action Plan on the Protection of Intellectual Property Rights:** 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. Unfortunately, the Coordination Committee has not been active since it issued a Greek national IPR plan in early 2009. 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.

**Cooperation against Internet piracy:** As file-sharing of pirated works becomes increasingly common in Greece, the difficulties rights holders face in working with ISPs to identify infringing users in the file-sharing environment have created a major obstacle to online enforcement, despite the efforts of copyright holders and the Hellenic Copyright Organization (OPI). 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 started more than two years ago under the auspices of OPI, whose aim is for ISPs to adopt voluntary measures to decrease Internet piracy. Unfortunately, in the absence of the government signaling willpower to bring about legislative change, so far the negotiations have not come to any result with ISPs showing no cooperation; in addition, the data protection provisions remain unchanged, notwithstanding the fact that the Ministry of Justice had promised to support the inclusion of felony copyright infringement as grounds in the data protection law for disclosure of personal data.

Greek ISPs do cooperate with rights holders in the rare cases involving websites within the .gr domain that host infringing material. In the more prevalent file-sharing environment, and the hosting infringing material cyberlocker and forum environments outside the .gr domain, but operated by local nationals with local IP addresses identified, 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.

**Actions by the tax police on 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, but the majority of the few raids it conducted in 2012 were against enterprise end-users and resellers within small and medium companies. The majority of these were against enterprise end-users. Greek Intellectual Property law provides a fine of €1,000.00 (US\$1,343) for each copy of illegal software used and €20.00 (\$26.86) for each illegal sound recording that is distributed by street vendors. The new department within SDOE imposed administrative fines of approximately €60,000 on infringers in 2012. 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 2012 the SDOE Directorate of Planning and Coordination of Audits sent 1,400 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 insurance companies, private clinics, shipping companies, telemarketing and ecommerce companies. Companies that do not reply to audit letters become possible suspects for raids. In 2012, SDOE issued raid orders to all its Directorates for companies that failed to respond to the 3,216 audit letters sent in 2011. 350 raid orders were addressed to Athens IPR Department, 76 raid orders were addressed to Thessaloniki Directorate, 23 raid orders were addressed to Western Greece Directorate, 15 raid orders were addressed to Hpeiros Directorate, 33 raid orders were addressed to Crete Directorate, 23 raid orders were addressed to Thessalia Directorate, 15 raid orders were addressed to Southern Aegean Ocean Directorate and 13 raid orders were addressed to Central Greece Directorate. However, only the Directorates of Athens and Thessaloniki have conducted any raids.

Moreover, in February 2011, in accordance with Article 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 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.

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 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. SDOE should also publish monthly statistics on the number of raids conducted and the resulting administrative fines imposed. More raids should be conducted 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 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 implemented the innovative law provisions now in place since January 2007, which 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. It is a matter of great importance that the government pursue administrative enforcement against software infringement and expand the scope of its administrative authority and undertake administrative enforcement with respect to establishments (cafés, restaurants, etc.) where there may be illegal reproduction of phonograms for public performance.

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 actions against software infringement:** BSA has no major issues to report regarding civil litigation during 2012. 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. Moreover, according to the new Greek law 4055/2012, a court hearing on any interim measure must take place within 30 days after the *ex parte* measure has been issued. The court decision should be issued at the latest within 60 days after the court hearing. In practice, according to the new law, within 90 days, starting from the issuing of the *ex parte* order, the temporary measures should be definitely granted, whereas in 2011 the aforementioned procedure could last over a year. However, the courts do not strictly implement this new provision, due to the extremely high number of pending cases.

**Criminal actions (raids):** The copyright industries report good cooperation with police authorities in Greece, however, the resources available remain insufficient.

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 approximately 13 criminal complaints in 2012. Of these, eight cases refer to DVD distributors and video club owners, while five cases refer to Internet cases. A total of 25,100 DVD-Rs have been confiscated. EPOE has also provided support to the police authorities in 77 *ex officio* raids throughout the year.

There is some indication that counterfeit videogame player peripherals are being imported from China through Greece's ports; however, there is only one case of Customs authorities intervention in 2012. Rights holders have conducted training seminars for customs officials at the Athens International Airport and the Port of Peiraeus, but current economic conditions and labor redundancy have a negative impact on those initiatives.

According to BSA, the IPR Department of the Greek Police conducted a small number of raids in 2011 and 2012, but has not provided BSA with precise details. These included 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, trained personnel and increased raids are needed.

**Challenges in the courts—long delays, non-deterrent sentences:** As in the past, court delays, postponements of hearings, and lack of deterrent sentences are the main obstacles to effective enforcement against hard goods piracy in Greece. According to MPAA, local rights holders report a handful of cases in which copyright infringement criminals were issued non-suspended sentences, an improvement over past years. Still, 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 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.

**Special IP Courts:** Specialized IP civil courts have been established in Athens, Piraeus and Thessaloniki. The copyright industries will continue efforts to promote expansion of 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.

## **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. However, some reforms are still urgently needed to allow rights holders to effectively enforce copyright in the face of modern challenges, foremost regarding Internet piracy and the 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. New initiatives are urgently required to introduce legislative amendments to bring about the following: encourage ISP coordination on copyright infringement matters regarding both hosted and non-hosted content, strengthen court-imposed fines and sentences against suspension or non-payment, 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 in 2012 on ensuring government agencies use only legal software. Governments should lead by example, stressing the importance of protecting intellectual property rights and legal software use within the Public Administration. By taking these positive steps and implementing policies that support legal software use, the Greek government could raise significant awareness of the problem and help bring down the unacceptably high software piracy rate.

**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. **The Attorney General has issued circulars that, at a minimum, would permit law enforcement to work with ISPs to obtain identification information for criminal enforcement, but ISPs have not complied.** A legal structure by which ISPs may reveal the identities of copyright infringers, consistent with the 2008 European Court of Justice (ECJ) *Promusicae vs. Telefonica* decision, is a critical component of an effective mechanism to address Internet piracy regarding hosted and non-hosted content. Such a provision should include appropriate steps to facilitate the ability of rights holders to obtain the necessary information to take civil actions to protect their rights.

**Law 3982/2011 for the confiscation and destruction of illegal merchandise:** The Ministry of Development, Competitiveness and Shipping introduced new provisions for the confiscation and immediate destruction of all merchandise illegally traded with the new Law No. 3982/2011 (and, more specifically, its article 74, para. 11). The law stipulates that all illegal merchandise, including those which constitute an infringement of copyright, shall be immediately confiscated and destroyed on the spot, if it is traded in violation of the Tax Code or if the vendor does not hold the permit and the legal documents required to accompany the sale of the goods.

This regulation facilitates the fight against physical street piracy, as compared to the previously followed procedure and formalities. At the same time, it strengthens the controlling ability of the Open Markets Control Service

and of the Municipal Police and contributes towards a healthier economy and spirit of entrepreneurship by protecting legal trade from unfair competition and public health from dangerous products.

There have been numerous raids in open markets throughout the country but it seems that, according to the statistic data of the Ministry, no DVDs and CDs were among the counterfeit products that were seized and destroyed.

## **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, has recently 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 has contributed to capacity building efforts for enforcement authorities by providing technical assistance, supporting and organizing training seminars, and providing technical experts in order to assist SDOE staff during the execution of administrative raids.

# ISRAEL

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** Israel should remain on the Watch List.<sup>1</sup>

**Executive Summary:** The Israeli government has the opportunity to take a major step forward in 2013, having prepared draft legislation to prohibit the circumvention of technological protection measures (TPMs), however, that legislation falls well short of the standards of the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonogram Treaty (WPPT). Those treaties, which the government should be encouraged to join, provide the basic legal framework for protection of copyright in the online environment; almost all the members of the Organization of Economic Co-operation and Development (OECD)<sup>2</sup> other than Israel have implemented and joined the WIPO treaties.<sup>3</sup>

One major 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. This problem needs a final favorable resolution. Piracy problems in Israel include enterprise end-user piracy of software, Internet piracy, book piracy, and physical piracy consisting mostly of burned recordable optical discs (CDs, DVDs, etc.). End-user software piracy is not subject to criminal liability as required by TRIPS, so enforcement in 2012 against end-user piracy consisted of industry self-help and seeking civil remedies. Right holders' abilities to halt online infringements were 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.<sup>4</sup> Israel has yet to introduce legislation to foster cooperation of ISPs to address infringement, including notice and takedown for hosted content and effective and fair mechanisms to deal with non-hosted infringements and repeat infringers.

### PRIORITY ACTIONS REQUESTED IN 2013

#### 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 Special Police IPR Units by adding staff and funding and providing them with *ex officio* raiding authority; assign a National Police Unit director to coordinate districts for effective and sustained enforcement.

<sup>1</sup>For more details on Israel's Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2013SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>. Israel was on the Priority Watch List in April 2012, but on September 24, 2012, United States Trade Representative Ron Kirk announced that Israel was being moved to the Watch List based on its introduction of three laws to the Knesset to improve the country's pharmaceutical patent regime.

<sup>2</sup>On September 7, 2010, Israel became the 33rd member of the Organization of Economic Co-operation and Development (OECD). See Organization of Economic Co-operation and Development, *List of OECD Member Countries - Ratification of the Convention on the OECD*, at [http://www.oecd.org/document/58/0,3746,en\\_2649\\_201185\\_1889402\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/58/0,3746,en_2649_201185_1889402_1_1_1_1,00.html).

<sup>3</sup>The following OECD members are members of the WCT and WPPT: Australia, Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States. As of the end of 2012, with the passage of legislation in Canada, Israel and Chile remained the only OECD countries not to provide TPMs protections. The U.S. Trade Representatives National Trade Estimate 2012 indicated, "Israel has signaled a new willingness to make progress on other IPR matters, such as implementing the core requirements of World Intellectual Property Organization (WIPO) Internet Treaties. The United States welcomes that willingness, and encourages Israel to proceed with full accession to, and implementation of, the WIPO Internet Treaties." United States Trade Representative, *2012 National Trade Estimate Report on Foreign Trade Barriers: Israel*, March 2011, at [http://www.ustr.gov/sites/default/files/Israel\\_0.pdf](http://www.ustr.gov/sites/default/files/Israel_0.pdf).

<sup>4</sup>Civil Leave to Appeal 4447/07 *Rami Mor v Barak* (Supreme Court, 25 March 2010). The case dealt with online defamation, but IIPA is concerned since the ruling is not limited to defamation cases.



- Tackle burgeoning Internet piracy through proactive Israeli Police pursuance of Internet piracy 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

- Enact law to protect against unlawful circumvention of TPMs as well as trafficking in (or the service of providing) circumvention technologies, devices, or components; amend Israeli proposal with changes in line with recommendations in this report.
- 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 procedure to halt non-hosted piracy, injunctive relief, and a duty on ISPs to provide information to law enforcement agencies and right holders.
- Amend the Copyright Act to, *inter alia*, confirm criminal liability against enterprise end-user software piracy and provide minimum statutory damages.

### Market Access

- Scrap regulation prohibiting foreign television channels from carrying some advertising aimed at the Israeli market.

## PIRACY UPDATES IN ISRAEL

**Enterprise End-User Piracy Causes Harm to U.S. Software Companies:** The level of software piracy in Israel has remained relatively low in recent years, at 31%, although the commercial value of unlicensed software remains significant at US\$192 million.<sup>5</sup> In Israel, many small companies that purchase legal software engage in under-licensing by deploying software on more computers than the license allows, and engaging in related breaches of end-user license agreements (EULAs) (such as the use of OEM products or educational versions of software products in commercial organizations). In 2012, BSA in Israel discovered that counterfeit Adobe software products were being shipped into Israel from Germany (bought on a popular auction site at a significantly lower price than the original). Protecting copyright in Israel and reducing piracy would bring positive gains to the Israeli economy. For example, a study released in 2010 by IDC and 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.<sup>6</sup>

**Internet Piracy:** A recent study showed that Israelis use the Internet for an average of 2,300 minutes per month, second in the world only to Canada.<sup>7</sup> More than 5.3 million Israelis used the Internet according with 1.8 million

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<sup>5</sup>BSA | The Software Alliance's 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Israel was 31%, representing a commercial value of unlicensed software of US\$192 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA's 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

<sup>6</sup> Business Software Alliance and IDC, *Piracy Impact Study: The Economic Benefits of Reducing Software Piracy: Israel*, 2010, at [http://portal.bsa.org/piracyimpact2010/cps/cp\\_israel\\_english.pdf](http://portal.bsa.org/piracyimpact2010/cps/cp_israel_english.pdf).

<sup>7</sup>Sharon Bauder, *Canada, Israel Rank Highest in Internet Usage*, VJ Virtual Jerusalem, January 11, 2011, at <http://www.vnetnews.com/articles/0.7340.L-4007770.00.html>.

fixed broadband subscribers as of the end of 2012.<sup>8</sup> As such, it is not surprising that Internet infringements have increased in Israel, with illegal P2P file sharing, BitTorrent, deep linking; illegal use of web bulletin boards and cyberlockers; and direct sharing of infringing files becoming more prevalent.<sup>9</sup> The recording industry has estimated in recent years that over 90% of all music transmitted over the Internet in Israel was infringing. The Entertainment Software Association (ESA) reports that during 2012, Israel, despite its relatively small population, was ranked 18th in the world in terms of the number of connections by peers participating in the unauthorized file sharing of select ESA member titles on public P2P networks.<sup>10</sup>

**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 the vast majority are infringing CD-Rs burned in small burn-to-order labs. While the Israeli 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.

## **ENFORCEMENT UPDATES 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 14-year-old claim, filed on behalf of its international members, sought 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 were filed after many years of trying to come to terms with cable operators directly. Courts have been somewhat supportive, with monetary damages awarded by District Courts. Nevertheless, efforts by AGICOA to establish a structure going forward for compensation from cable operators have continued to meet resistance. Cable operators have avoided payments for well over a decade through skillful manipulation of the court system. It seems clear that cable operators intend to resist from serious settlement discussions and further recourse to the courts is of problematic value owing to the time and expense required for continuous court battles.

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.

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<sup>8</sup> International Telecommunication Union, Fixed Broadband Subscriptions 2000-2011, at <http://www.itu.int/ITU-D/ict/statistics/material/excel/Fixed%20broadband%202000-2011.xls>, accessed on January 10, 2013.

<sup>9</sup>The 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.

<sup>10</sup>These figures do not account for downloads that occur directly from hosted content, such as infringing games found on "one-click" hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

**Software Piracy Currently Addressed by Civil Remedies Which Are Often Inadequate:** The software industry relies on self-help and civil remedies to address enterprise end-user piracy and other forms of software piracy in Israel. Enforcement activities in Israel are chiefly aimed at unlicensed software use by enterprise end-users. In 2012, the courts in Israel provided 113 judgments based on the Israeli Copyright Act of 2007. Five of those judgments were provided by the Supreme Court. The software industry also worked on many administrative actions and cease and desist letters. Unfortunately, as discussed in this report, the Israeli government does not consider unauthorized use of software by enterprises to be a crime in Israel, a major deficiency in the law. 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, to IIPA's knowledge, 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 has not been helpful. A major improvement would be in the area of awarding adequate damages at least equivalent to the market value of the infringed software products, and realistic expenses (legal expenses such as attorney's fees) to copyright owners prevailing in their cases. As things stand, copyright owners tend to settle cases with infringers in order to avoid the courts since winning a case at court costs more than the judgment at the end of a successful case. 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 EULA, have forfeited their authorization to use the software.<sup>11</sup> 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.

Software industry representatives participate regularly in forums and lectures, and engage in public awareness over issues such as protection of software and, for example, announcing BSA's global software piracy study in 2012. 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.

**Important 2011 Case Involving Piracy of Textbooks Establishes Criteria for Contributory Liability in Israel:** In a case involving copying of textbooks, *Hebrew University of Jerusalem vs. Yaakov Cohen*, the Supreme Court of Israel in 2011 clarified the doctrine of contributory copyright infringement under Israeli law. The facts of the case are that the Israeli 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 the original of which sells for NIS89. Shocken sued the publisher-distributor, Yaakov Cohen, the Labour Party, and Hebrew University. The Court held that in order to find the defendant liable for contributory infringement, a plaintiff has 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.<sup>12</sup> This case sets an important legal principle under which those who, while not directly infringing, can nevertheless be held contributorily liable for copyright infringement of others.

**Israeli Government Recognizes Importance and Complexity of Addressing Internet Piracy Problem:** The Israeli government has recognized the importance of Internet piracy issues, as detailed in previous filings in the Special 301 process.<sup>13</sup> 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

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<sup>11</sup>The 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.

<sup>12</sup>*Appeal to the Supreme Court 5977/07 by the Hebrew University of Jerusalem vs. Yaakov Cohen, the Labour Party and Schocken Publishing House against the ruling by Y Shapira in T.A. 6306/04 from 17 May 2007*, June 20, 2011 (heard on November 15, 2010 by Deputy President Rivlin, and Justices Jubran and Danziger).

<sup>13</sup>The Israeli government has indicated in its 2009 Submission to USTR in the Special 301 process that "[p]iracy carried out through the internet is ... receiving attention," and noted, "like in many countries, where the servers are located outside of the jurisdiction enforcement is impeded," while when "activities are carried out from Israel enforcement is easier." The government's point regarding the potential complexities of enforcement when multiple jurisdictions are involved in an infringement is well taken, although the IFPI cases indicate that it is quite possible, and indeed, in the years ahead, will be necessary for enforcement authorities to deal with cases in which activities occur both domestically and extraterritorially.

infringement. The ability to bring effective civil actions has 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 legislators to rectify the problem and pass legislation explicitly granting courts the powers to order disclosure. The Knesset is reportedly working on legislation. 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 case from 2011 (*ALIS – Association for the Protection of Cinematic Works v. Rotter.net Ltd.*),<sup>14</sup> 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 infringing and 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.<sup>15</sup>

**Establishment of Special IP Court Could be Helpful:** In 2012, there were no practical steps in establishing IP courts. In some of the “regular” courts, there are judges who are more experienced in intellectual property issues, and cases are usually channeled to those judges. However, it would be helpful if the Israeli government proceeded to establish specialized courts, particularly in conjunction with further copyright law modernizations being explored, including those related to Internet-based issues, the intersection with privacy interests, and TPMs.

## **COPYRIGHT LAW UPDATES AND RELATED ISSUES**

**Copyright (Amendment - Protection of Technological Means and of Means for Management of Rights) Bill, 5771-2011:** In 2012, the Israeli Ministry of Justice released the Copyright (Amendment – Protection of Technological Means and of Means for Management of Rights) Bill, 5771-2011. IIPA commented on the Bill to the Minister of Justice and understands from the Ministry that they are preparing a substantive response.

IIPA appreciates the drafters' acknowledgement that the ease of dissemination of digitized materials via the Internet “creates a problem with respect to the protection of works in which there is copyright.” As the drafters further note, “these challenges have led, *inter alia*, to the development of technological means of protection of works and the implementation of electronic information regarding the management of copyright in works, with the aim of protecting the rights of copyright holders as far as possible.” The drafters then note that the Bill was drafted with a view to “suit the requirements of” the WCT and WPPT. The following observations and comments are intended to provide input as

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<sup>14</sup>*ALIS, the Israeli Anti-Piracy Organization v. Rotter.net*, CA 567-08-09, August 8, 2011 (on file with IIPA).

<sup>15</sup>See discussion of case at David Mirchin, Adv., *IT Update: Are Websites Liable for Links to Infringing Materials?* January 2012 (on file with IIPA).

to the improvement of those important provisions. In the present day, TPMs serve to enable access to more copyright materials, in more diverse ways, by more consumers, and at more affordable price points, than ever before. In this way, TPMs serve the fundamental goals of the copyright system, not only fostering more creation of copyright materials, but encouraging dissemination and access to such materials, through healthy and legal e-commerce transactions. The drafters have placed focus on one effect of TPMs, which is to restrict the unauthorized uses of copyright materials, but have not acknowledged in their draft documentation the very important correlative purpose of TPMs – to enable access to legal content and legal content distribution models. By referring to TPMs as “locks” the drafters have missed a key point, which is that TPMs are enabling technologies for digital dissemination. Unfortunately, what follows from this basic misunderstanding is a draft Bill that fails to provide adequate protections required by the WCT and WPPT, and that adopts an approach that will discourage rather than encourage legitimate distribution models to flourish in Israel.

- **Coverage of Both Act and Trafficking:** First, it is acknowledged in virtually all countries that have implemented TPMs protections that the coverage of merely the act of circumvention of TPMs would be inadequate. Virtually all countries having implemented the WCT and WPPT consider prohibiting trafficking in circumvention tools (manufacture and distribution of devices, components and technologies), and the provision of circumvention services, necessary to provide “adequate legal protection” as required by both the WCT and WPPT. Unfortunately, the draft (Draft Section 46B) fails to prohibit trafficking in circumvention tools or the provision of circumvention services. The draft, in the section on “limitations” (Draft Section 46D), even appears to legitimize those who “create a device for the bypassing of technological means of protection in order to make permitted use of a locked work.” Under the Israeli draft Bill approach, right holders would have no choice but to sue and seek prosecution principally of individuals using circumvention tools, rather than targeting those whose business models are built on circumvention for unlawful access to, or exercise of, rights in copyright materials. Surely such a policy outcome could not have been intended by the drafters.
- **Coverage of Both Access and Copy Controls:** The definition of “Technological means of protection” (Draft Section 46A) does not include those TPMs which prevent access to copyright materials, leaving only a TPM that “is intended for use and is efficiently used in order to prevent, restrict or impede the breach of copyright in a work.” The prohibition in Draft Section 46B further imposes a requirement that the person circumventing the TPM must have known or had constructive knowledge that “such bypassing would lead to a breach of copyright in a locked work.” The language of the WIPO treaties, “in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works [or phonograms/performances fixed in phonograms], which are not authorized by the authors concerned or permitted by law” means that not only copy controls but also access controls must be covered, and the majority of countries having implemented TPMs protections agree. The drafters should ensure that the definition of “Technological means of protection” includes those which restrict, prevent or impede access to copyright materials, and should remove the requirement that there be a showing of knowledge (at least for civil liability) that the circumvention resulted in a “breach of copyright.” Further, the definition of “Technological means of protection” (Draft Section 46A) should relax the requirements, i.e., it should cover as TPMs “any technology, device, or component that, in the normal course of its operation, controls access to, or the exercise of rights in” copyright materials. The purpose test (“is intended for”) and the subjective test of the level of a TPM’s effectiveness (“is efficiently used in order to”) should be removed.
- **Broad Exceptions Defeat the Adequacy of Protection Against Unlawful Circumvention:** Draft Section 46D(a) provides, “The provisions of this Chapter shall not derogate from the right of any person, alone or via others, to bypass technological means of protection or to create a device for the bypassing of technological means of protection in order to make permitted use of a locked work.” This exception essentially stands TPMs protections on their head, since it protects those who engage in circumvention, but worse, protects not only those who assist the act of circumvention, but even those who traffic by manufacturing circumvention devices. The problems with this Draft Section include the following:

- First, any exceptions to the prohibition on circumvention must be narrowly tailored to serve important societal goals. Simply allowing circumvention for any “permitted use” will essentially eviscerate protection of TPMs, since anyone circumventing can claim they are doing so for a permitted purpose.
- Second, the inclusion of the ability to circumvent “via others” essentially would legitimize circumvention businesses, as long as they claim they are circumventing for their customers to “make permitted use.” The law should be designed to encourage copyright owners to disseminate their works in digitized formats with the security that they will not be stolen. This express acquiescence to circumvention services would create a monumental disincentive to creators releasing their works in Israel.
- Third, the exclusion from coverage of those who “create a device for the bypassing of technological means of protection in order to make permitted use of a locked work,” when read with the definition of “Device for bypassing technological means of protection” in Draft Section 46A (“a device, product, technology, computer software, component or any other means the purpose of which is to bypass technological means of protection or to assist in the bypass thereof, provided that such does not have any other use”), results in lack of coverage of traffickers, explicitly, to those who manufacture circumvention devices, but also to all those downstream who then use those devices or assist their use.

There remain other issues that should be addressed, for example, whether the remedies for violating the law are effective, but since so many of the problems relate to the lack of coverage for trafficking (and services) and for access controls, as well as the gaping exceptions that plague the Draft Bill, those should take precedence in terms of rethinking the approach to this issue.

**E-Commerce Bill to Address Online Infringement Would be Helpful:** 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, 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:** Copyright law in Israel is governed by the Copyright Law, 2007. 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. The following are some remaining areas of concern for the copyright industries in Israel that should be addressed.

- **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 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 an enterprise 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 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\$2,700) and maximum of NIS20,000 (US\$5,400). While the higher maximum is very helpful, the fact that there are no longer minimum statutory damages has harmed enforcement. To illustrate, while some courts have awarded zero damages against some infringers, no court has ever awarded any amount approaching the NIS100,000 (US\$27,000) maximum. The courts do not tend to rule over NIS20,000 (US\$5,400) per infringement and in many cases, the court rules a much lower sum than NIS10,000 (US\$2,700) in the court's discretion. 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. Judgments regarding software copyright infringements have sometimes 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. A major weakness of the Israeli Copyright Act is the lack of minimum statutory damages for copyright infringements.
- **Protection for Foreign Phonogram Producers on Basis of National Treatment Desired (Sections 8, 10):** Under the 2007 Law, foreign right holders in sound recordings (other than U.S. sound recordings which enjoy national treatment on the basis of bilateral arrangements) were denied equal treatment and could be denied rights, and therefore payments, for their sound recordings in Israel. The government should reinstate protection for foreign sound recordings enjoyed under the previous law, granting all foreign phonogram producers the full set of rights granted to Israeli nationals.<sup>16</sup>
- **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

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<sup>16</sup>The 2009 Israel Submission indicates, among other things, that "[t]he treatment of sound recordings under the new Copyright Law is fully conformant with Israel's bilateral and multilateral obligations," a statement with which we agree. However, the Submission fails to address the justification for the weakening of protection, i.e., the failure to maintain protection under the previous law, and the move from providing equal national treatment to discriminatory treatment for non-U.S. foreign recordings.

recordings.<sup>17</sup> The international trend is for more countries to amend their laws to provide at least 70 years for sound recordings, and the government of Israel should agree to follow this trend and provide a longer term to producers of sound recordings in Israel.

- **Protection for Pre-Existing Works and Rule of the Shorter Term (Section 44):** Section 44 of the Law intends to impose a rule of the shorter term on works/phonograms, but apparently misapplies this rule in a way that violates Israel's obligations under Article 7(8) and 18 of the Berne Convention. Namely, Section 44 provides, "The period of copyright in a work listed below shall not be longer than the period of copyright prescribed for such work in the law of its country of origin..." Article 18 of the Berne Convention requires that Israel protect "all works, which, at the moment of [the Berne Convention] coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection." It is well understood that this requires Israel to protect U.S. works, including those that may have fallen into the public domain due to failure to comply with a Berne-prohibited formality, or which never had a term of protection due to failure to comply with a formality. The rule of the shorter term allows that the "term shall not exceed the term fixed in the country of origin," not the term "prescribed for such work" as in the Israeli provision. It is well understood that the "term fixed" means the term the work would have enjoyed had all formalities been complied with. Thus, Israel's Section 44 may be deficient as compared with the Berne Convention and TRIPS, since there may be works or phonograms which fell into the public domain in the United States due to failure to comply with a formality, but which under Berne Article 18, must be protected in Israel. Israel must confirm that Section 44 meets the international obligation, or must amend it so that it does so.
- **Parallel Importation:** The definition of "infringing copy" in Paragraph 1 of the 2007 Law excludes from protection copies made with the consent of the owner of rights in the country of manufacture and imported into Israel. This 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 the Patent and Trademark Office, 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).

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<sup>17</sup>Indeed, since those works are measured from the date of publication (or in the case of "records" from the date it was created) it is even more imperative that, for the sake of providing proper incentives for further creation and dissemination, that an attempt be made to arrive at an equivalent number of years to "life of the author" plus seventy years. In the United States, studies were conducted to arrive at the actuarial equivalent of "life of the author" plus seventy years, which was demonstrated to be ninety-five years from publication.

- The **temporary copy exception** (Section 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 ISSUE**

**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.<sup>18</sup> 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 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.

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<sup>18</sup> 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 3.

# ITALY

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** Italy should remain on the Watch List in 2013.

**Executive Summary:**<sup>1</sup> In 2012, the Italian Communications Regulatory Authority (AGCOM) was to move forward with important regulations to address online infringement, but that program appears to have come to a halt. With new leadership at the helm of AGCOM, Italy should resume the momentum it gained during 2011 to establish effective measures against Internet piracy, as well as needed legal and enforcement improvements. Meanwhile, end-user piracy in Italy is second only to Greece among Western European countries in its levels of end-user piracy of business software. This is due in part to jurisprudence holding that self-employed professionals cannot be held criminally liable for software piracy, making it virtually impossible to prosecute software pirates engaged in the professions. IIPA expresses its appreciation for needed technical assistance efforts, such as the IPR Workshop organized in 2012 by the U.S. Embassy in Florence, which are important to raise awareness among high level representatives of the value of IPR protection and enforcement to Italy's economy.

The extremely high levels of piracy in Italy's market have not declined in the past year, despite another year of enforcement achievements against major online peer-to-peer (P2P) piracy hubs and torrent indexing and tracking sites. This can be explained by several gaps in the available enforcement mechanisms in Italy. First, in the absence of notice-and-takedown procedures similar to those contemplated by AGCOM in 2011, Italy's civil courts have neither the capacity to process the number of online piracy complaints rights holders need to submit for injunctions, nor the ability to respond to such complaints in a speedy manner. Civil remedies for IP cases in Italy need improvement, and it remains to be seen whether the recent absorption of the IP specialized courts into newly established corporate sections will allow more resources to be dedicated to rights holders or instead dilute what IP expertise previously existed. Second, repeated attempts to establish cooperation between rights holders and Internet service providers (ISPs) in recent years have reached no significant result. Italy's incorrect implementation of the e-Commerce Directive has created a favorable legal environment for local ISPs, such that they have no motivation to reach voluntary agreements to assist in anti-piracy actions. Third, due to Italy's jurisprudence in the area of privacy law, rights holders are unable to obtain the information necessary to bring civil cases against online piracy, and so are reliant upon criminal enforcement to keep major online piracy hubs at bay. The practical result is that to tackle Italy's pervasive Internet piracy, criminal actions are dependent on the cooperative but resource-poor assistance of the Fiscal Police, and often must then overcome prosecutorial indifference if they are to result in deterrent sentences. Stakeholders contributed heavily to AGCOM's consultation in developing effective procedures that would provide a more speedy and comprehensive response to online piracy while respecting due process, and IIPA encourages all concerned parties to resume these efforts in earnest in early 2013. A successful outcome could not only permit more legitimate investments to flourish in Italy, but could also ease what is currently a heavy burden on Italy's courts.

### **PRIORITY RECOMMENDED ACTIONS FOR ITALY IN 2013**

- Resume and complete efforts to adopt AGCOM's proposed regulations, establishing an effective system for the active cooperation of ISPs with rights holders against online infringement.
- Coordinate government bodies at a high level toward focused IP enforcement efforts and increased IP training for the police and the judiciary.

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<sup>1</sup>For more details on Italy's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2013SPEC301HISTORICALCHART.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2013 global issues, see our cover letter at <http://www.iipa.com/pdf/2013SPEC301COVERLETTER.pdf>.



- Continue with important criminal actions against P2P and link site services that meet the criteria for seizure orders and liability established in the PirateBay decision, and issue injunctions against access to those services.
- Increase dedicated IP resources, including judges and staff, within the specialized corporate judiciary section toward timely resolution of IP cases.
- Eliminate legal obstacles for rights holders to take appropriate civil actions for the protection of their rights in the online environment, including by gathering non-personally identifying IP addresses and, consistent with the European Court of Justice (ECJ) decision in the *Promusicae v. Telefonica* case, identities of infringers to establish underlying infringement in cases against major infringing web operators.
- Simplify private enforcement actions by eliminating unnecessary and formalistic steps under the procedural law (e.g., the need to serve the defendant with the deeds of the case in urgent cases within eight days)
- Effectively enforce the Anti-Camcording Law to curb the increasing problem of theatrical camcord theft and theft of dubbed soundtracks.
- Clarify that professionals, like corporations, who infringe copyright on software in the framework of their activities are criminally liable under Article 171**bis** of the Copyright Act.

## **COPYRIGHT PIRACY IN ITALY**

**Internet piracy generally:** The Italian public remains undeterred in its heavy engagement in Internet piracy, a problem that pervades the Italian market in a variety of forms. Again in 2012, authorities can boast some enforcement successes against major online piracy operations, but many forms of digital piracy continue to be unaffected and widespread. For many of IIPA's members, websites that link to illegal files available from P2P file sharing networks and cyberlockers have become the greatest concern in Italy. As authorities shut down major domestic sites, unaffected foreign sources and new domestic P2P networks and cyberlockers step in to keep a steady supply of infringing files available, and as a result, those forms of online piracy have not abated. In such a fluid environment, linking sites play the important role of ensuring that alternative sources of infringing material can persistently take root, more quickly than can be addressed with large-scale criminal cases. Mobile device piracy of music and videogames is also growing rapidly. As a result of this and enforcement deficiencies, the country's market of 35 million Internet users – the fourth largest in the EU – is far less accessible to legitimate digital content providers than it should be.<sup>2</sup> Furthermore, as one of the countries with the highest level of illegal online uploading and downloading activities, Italy can be considered a major exporter of infringing material.

**Online piracy of entertainment software:** The Entertainment Software Association (ESA) reports that Internet piracy remains a severe problem for its members in Italy, which in 2012 placed third 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.<sup>3</sup> 2012 was also witness to a growth in sites specializing in the provision of links to infringing videogame content stored on third-party hosting platforms (i.e., “cyberlockers”).

**Online piracy of books and journals:** The Association of American Publishers (AAP) reports high levels of piracy of books and journals on P2P networks, with Italy ranking among the top five problem countries for publishers.

**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

<sup>2</sup>There are an estimated 35.8 million Internet users in Italy as of June 2012, a 58.4% penetration rate. <http://www.internetworldstats.com>.

<sup>3</sup>ESA's reporting on P2P activity does not take into account downloads of these titles that occur directly from hosted content, such as games found on “cyberlockers” or “one-click” hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

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. A recent survey issued by the CENSIS (one of the most important research institutes in Italy) estimates that the “fake market” of CDs, DVDs and software generates 1.8 billion euros. According to this study, the overall illegal market of counterfeiting and piracy costs the State 1.7 billion euros in lost fiscal taxes.

**Online piracy of audiovisual works:** New digital platforms entered the Italian market in 2012 to offer legitimate audiovisual content online, and the variety of legitimate e-commerce platforms increased. Still, P2P piracy and infringing cyberlocker websites, and the links and forums directing users to illegal copies of movies, continue to damage the film industry at a steady pace in Italy. The landscape for online piracy of audiovisual works has incorporated new forms of piracy in 2012, including a growing role for popular social platforms. Most of the indexing activities of illicit links are now shared on Facebook social communities (both open and closed), in connection with infringing files posted on Google/YouTube and applications downloadable on the iTunes App Store and Google Play. Illicit mobile applications have moved to the forefront of concerns for the Motion Picture Association (MPA) in Italy. In August 2012, rights holders sought and obtained the removal of the illicit application “Film Completi” from the Apple Store. This app optimized and indexed access to infringing links on YouTube for any Apple devices.

MPA, through its local affiliate the Audiovisual Antipiracy Federation (FAPAV), reports that the overall incidence of audiovisual piracy in Italy is growing. 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 MPA members content, MPA 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.<sup>4</sup> A phenomenon unique to the audiovisual industry is the illicit recording of Italian language audio tracks in theaters immediately following a film’s release, which are then added to good quality pirate video found on the Internet.

The independent segment of the film and television industry (IFTA) reports that Internet-based piracy has negatively affected business in Italy and prevents the establishment of legitimate online distribution services – harming consumers and rights holders alike. 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 software:** The Internet is a growing source of unauthorized 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 file sharing 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.

**Enterprise end-user piracy of software:** BSA | The Software Alliance (BSA) reports some improvement in the rate of software piracy in Italy thanks to increased frequency of audits and raids by the tax police in 2012. Still, the software piracy rate stands at nearly 50% with a commercial value of unlicensed software of nearly US\$2 billion.<sup>5</sup>

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<sup>4</sup>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 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.

<sup>5</sup>BSA | The Software Alliance’s 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Italy was 48%, representing a commercial value of unlicensed software of US\$1.95 billion. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open (...continued)

This includes widespread use of unlicensed software by enterprises and loading of pirated pre-installed software on PCs. According to a 2010 report, 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 ten percentage points. This would create more than 7,500 jobs, US\$5.2 billion in local industry revenues, and nearly US\$1.8 billion in additional tax revenues.<sup>6</sup>

**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. Italy also serves as the receiving port of a great deal of counterfeit and pirate physical products, mainly originating from China, that is subsequently exported to other European countries.

Audiovisual works: MPA reports that physical piracy still hits the industry hard in Italy. According to a study conducted by Rome-based Censis in 2010, the value of seized pirate optical disks (including CDs and DVDs) was 1.785 billion euros, a level that continues in 2012, as confirmed by important seizures in the past year.

**IFTA:** IFTA reports that physical piracy 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 films 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. Independent producers and distributors confirm that DVD sales have been particularly impacted since pirated DVDs are readily available on the street, at kiosks and in shops throughout Italy. Unable to compete with free, legitimate distributors often 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 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. 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.

Entertainment software: Pirated hard copies of video games have not disappeared from the Italian market, although online piracy is now the predominant problem facing the industry in Italy.

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source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA's 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

<sup>6</sup>The Economic Benefits of Reducing PC Software Piracy, commissioned by BSA and conducted independently by International Data Corporation (IDC), released September 15, 2010, looks at the bottom-line economic benefits of reducing piracy in 42 countries that together account for 93 percent of the total packaged software market. It is available online at <http://www.bsa.org/idcstudy>.

## **REFORM FOR COOPERATION ON INTERNET PIRACY**

In the experience of IIPA's members, the Government of Italy has not established the needed incentives to encourage ISPs to proactively cooperate with efforts to tackle illegal file sharing and other copyright infringements online. Some of the copyright sectors report that some major local ISPs and international ISPs with local offices have begun to cooperate with rights holders, but only on a reactive basis. ISPs not physically located in Italy but that reach the Italian public continue to be reluctant to cooperate, and do not comply with requests from Italian judicial authorities, citing lack of jurisdiction.

Since Italy adopted the "*Decreto Romani*" in 2010, assigning 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 the efforts of AGCOM to seek broad-based support for this initiative, and had hopes that the initiative could address some of the escalating piracy problems in Italy. But over the course of consultations, the initiative lost key elements that might have provided more efficient remedies against foreign online sources of infringing content or addressed problems related to P2P piracy directly. In 2012, AGCOM's draft regulation suffered from a further setback as the terms of the previous Authority's Chairman and Board expired in May 2012, and the Italian Parliament failed to clearly define the role of AGCOM going forward.

In June of 2012, the Chamber of Deputies and the Senate appointed the new Chairman and Board of AGCOM, for a seven year term. In a recent hearing before the Parliamentary Committee of Inquiry on Counterfeiting and Piracy in the Commercial Field, the new AGCOM Chairman, Angelo Cardani, announced that the Authority will renew its work on the issue in 2013 with the aim to adopt a regulation against digital piracy by the end of June 2013.

At the heart and purpose of AGCOM's work under the 2010 *Decreto Romani* was 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 opportunity is lost. Central to the AGCOM draft regulations was a multi-step "notice-and-takedown" procedure that would have applied to hosts or uploaders of infringing content. IIPA encourages AGCOM to ensure that such a 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 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 (including such sites that may be based overseas), and operators that promote certain sites.

On a separate track, in fall 2012, the Parliamentary Committee of Inquiry on Counterfeiting and Piracy in the Commercial Field started a series of hearings on the subject of digital piracy. By the end of the current legislature, the Committee expects to draft a final report summarizing all the contributions received on the issue and identifying some possible solutions. However, the contents of this report will not be binding. Parliamentarians have attempted to adopt more decisive rules, proposing two amendments in 2012, signed by Deputy Giovanni Fava (Lega Nord Padania), Chairman of the above mentioned Parliamentary Committee of Inquiry on Counterfeiting and Piracy in the Commercial Field, with the goal of defining the responsibility of the operators of hosting services in the event that illegal content is stored on their servers. The proposals also provided that in some cases the judicial or administrative authority could require the hosting provider to monitor the content posted by users of their service. Unfortunately, Parliamentarians shot down both proposals. The Committee has, however, approved a final report, explaining the dangerousness of digital piracy and the need to address illegal platforms, including through more active cooperation from search engines and ISPs.

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 proposed measures. The copyright industries look forward to continued engagement with AGCOM in this effort.
- 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.

## **COPYRIGHT ENFORCEMENT IN ITALY**

IIPA members report that enforcement actions related to Internet-based piracy have increased in 2012, but generally at the initiative and with the technical assistance of local rights organizations. Criminal copyright infringement in hard goods falls under the competency of the Fiscal Police, which do carry effective IPR related *ex officio* enforcement actions. (The Telecommunications Police have jurisdiction over online crimes, but their efforts to date have focused on areas such as child pornography and cyber attacks.) Coordination that would permit more effective action against Internet piracy is at a standstill, and will remain on hold unless and until Italy, perhaps under AGCOM's authority, succeeds in developing a national strategy for anti-piracy over the Internet. Rights holders report very good cooperation on the part of enforcement authorities, including the Fiscal Police at the local and national level and with the Fiscal Police's "GAT" department, a special division dedicated to online fraud. However, the Fiscal Police should develop more competences and dedicate more resources over Internet-based piracy. To the extent Italian customs authorities have competence (i.e., outside of intra-European imports), they operate with general efficiency and take on many *ex officio* actions.

As in the past, specialized forces – particularly prosecutors – are resistant to the idea that copyright crimes are serious offenses and fail to prioritize copyright cases. The absorption of specialized IP courts into the corporate court sections leaves many questions as to how needed resources will be allocated in IP cases in the future. To date, some courts have specialized sections that in practice handle a variety of cases, and are only "specialized" to the extent that a portion of their day is allotted to IP crimes. Procedural obstacles also prevent prosecutors from bringing actions against professionals for end-user piracy of software, creating a major gap in enforcement from a large sector of the software market.

Overall, due to lingering weaknesses in the overall Italian enforcement system including severe delays in the judiciary, the copyright industries still face difficulties 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:** As in recent years, several actions in 2012 against Internet piracy 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) jurisdictional challenges to orders and information requests from Italian authorities against foreign ISPs, which can severely stall enforcement actions for Internet piracy facilitated abroad, (2) inconsistent holdings as to ISP responsibilities in cases of online piracy, and (3) 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. For the Fiscal Police to take actions against infringing websites, there must be clear evidence of infringement on a commercial scale for a demonstrated

purpose of gain (for example, beyond downloading from file-sharing networks). Detailed reports must be submitted to local police offices to initiate any meaningful cooperation and investigation. Because the Fiscal Police lacks a specific department dedicated to online piracy, the timing from submission of reports to the closure of the operation can be quite long.

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. 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 or ordered injunctions against other major sites involved in illegal file sharing, streaming, and downloading; however, these efforts involved significant resources and compliance with time-consuming procedures on the part of the private sector. Website seizures and blocks against foreign illicit domains are among the important operations Italian authorities achieved to combat online piracy in 2012. Specific to the video game industry, in 2012, Italian courts placed injunctions on three local linking sites and three foreign torrent indexing/tracker sites. For the film industry, two years after the popular infringing website "linkstreaming" was shut down, the case against the site's administrators continues to move forward, although its outcome will be heavily dependent on the participation of Italy's public prosecutors.

Despite some advances that FAPAV made in data privacy issues in its case against Telecom Italia,<sup>7</sup> Italian jurisprudence still appears to limit the ability of rights holders to use collected data in actions against individual infringers. Civil enforcement against P2P piracy has been severely hampered by the Rome High Court's interpretation of Italy's Privacy Code in the famous Peppermint cases, and by a March 2008 ruling of the Data Protection Authority to the effect that use of tools to gather IP addresses of infringers would violate the Privacy Code.<sup>8</sup> Unless rights holders can obtain IP addresses and thereafter the names of subscribers via a civil court order, civil enforcement against infringing users will, as a practical matter, be impossible.

**Enterprise 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 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

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<sup>7</sup>The history of FAPAV's case against Telecom Italia is detailed further in IIPA's 2012 Special 301 filing, available at <http://www.iipa.com/rbc/2012/2012SPEC301ITALY.PDF>.

<sup>8</sup>The Peppermint case was brought by the Germany music publisher Peppermint Jam Records GmbH, and has created a domino effect, on the controversial issue of monitoring P2P networks to acquire IP addresses of infringers. It started with an injunction issued by the Court of Rome (Procedure n. 81901/2006) that required Telecom Italy to disclose about 3,636 names of Italian Internet customers/infringers. The case was based on the use of anti-piracy software managed by the Swiss company, Logistep, on behalf of Peppermint, and the data collected consisted essentially of IP addresses of customers sharing copyrighted files through platforms like eMule or BitTorrent. Peppermint proceeded to send letters to some of the identified infringers with a settlement proposal of €330.00 (US\$452), in exchange for a pledge to refrain from turning the names over to the criminal authorities. There were a number of other similar proceedings brought by Peppermint and a Polish videogame publisher, Techland. While the Rome Court initially sided with the rights holders, in a later injunction proceeding, after intervention by the Data Protection Authority, the court reversed its ruling and denied the rights holders' requests. This eventually led to the March 2008 rule by the Authority that use of such software violated the Italian Privacy Code and the EU privacy directive and the resulting names could not be disclosed.

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 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. In 2012, BSA supported authorities in 64 criminal raids, 32 of which resulted in the seizure of illegal software valued in total at more than US\$ 1 million (763,000 euros). However, when cases are put before the court, 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 2012, 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 local websites and three foreign sites engaged in the piracy of videogame content. With respect to litigation against the importers and distributors of devices that the circumvention of technical protection measures (TPMs), a key anti-piracy tool for the video game industry, two criminal courts (Pordenone and Turin) in 2012 convicted a total of 12 individuals for the sale of video game circumvention devices.

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 2012 included injunctions against three major international BT portals; *Kickasstorrent*, *Torrentreactor*, *Torrents.net*. Four Italian sites have also been shut down: *DDuniverse.net*, *Italia-film.com*, *mp3basi.com*, *ilfilm.net*. 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 more than 500,000 infringing music files. Operations in violation of the rights of broadcasting or other communication to the public (i.e., public performance) also continued to be problematic in 2012. Radio stations, web radio, discos, music providers and commercial premises using unlicensed music have been identified, and more than 300 criminal cases were initiated in 2012.

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:** Italy's civil courts suffer from a lack of resources that can mean major delays in proceedings. As it stands in Italy, injunctions are among the few effective measures in the civil arena, but given the evidentiary obstacles to civil enforcement posed by Italy's privacy laws, injunctions are of no use to rights holders against online piracy. It is extremely important that new competent judges are allocated to the specialized courts with jurisdiction over IP, to avoid creating further delays in civil proceedings. 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. Furthermore, rights holders face evidentiary obstacles due to an interpretation of the law by the Data Protection Authority in 2008, described in detail below under Law Reform.

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). 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 serves 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 take down 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 of [i.e., notice from] the competent authorities or any interested person." While the introduction of these provisions was an important step forward, they were, unfortunately, withdrawn from consideration in early 2012, and future work still remains uncertain.

**Legislative efforts in 2012:** The Italian Parliament recently passed a law containing several provisions related to the implementation of the Italian Digital Agenda and to the promotion of the competitiveness of the country. Among the main changes included are completion of the National Broadband Plan, next generation networks (NGN), electronic payment, e-Health, digital school and many more. The Italian Government and Parliament are also in the process of discussing a Development Decree that would aim to promote growth among startups and small- and medium-enterprises (SMEs), with an emphasis on the use of intellectual property for competitive advantage. During the parliamentary discussion, an amendment was approved that provides a tax credit of 5 million euro for each year in 2013, 2014 and 2015 for the development of new online platforms. The objective is to support the digital content market.

**Court of Companies:** The so called "Liberalization decree" (law no. 27, dated March 24, 2012) among other things, established the Court of Companies and the Simplified Limited Liability Company, Section 2 introduced in courts and courts of appeal located in the capital of each region a "special" department in order to manage disputes on commercial and corporate matters. These amendments did not provide for new specialized civil departments, as was hoped, but instead extended the competencies of the existing departments from industrial and intellectual property matters to include disputes concerning antitrust, corporate matters, shareholders' agreements,

etc. The reform is unwelcome as it will place a heavier burden on judges and force them to deprioritize IPR cases, most likely diluting any existing IPR expertise.

**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 for a profit.

**Eliminate the SIAE sticker requirement for software and music recordings:** This problem remains a major concern for the 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 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,<sup>9</sup> 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 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.

## **TRAINING AND TECHNICAL ASSISTANCE**

During 2012, FAPAV, together with other Anti-piracy Organizations, took part in training programs planned with Fiscal Police General Headquarters that were held around Italy and were attended by almost 2,000 officers. Topics concern audiovisual, music, software, satellite TV and video game piracy, with a primary focus on digital piracy of copyrighted works. FAPAV reports a modest growth in familiarity with more cutting edge forms of piracy among the officers that participated.

BSA provides regular training to police forces, and in 2012 conducted ten such training programs. BSA also provides technical assistance or support for a number of raids (64 in 2012).

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<sup>9</sup>Article 9 of TRIPS requires compliance with the provisions of the Berne Convention, including Article 5(2), which prohibits countries from subjecting the "enjoyment and the exercise" of copyright rights to any formality. Italy's stickering, associated fee and declaration requirements represent prohibited formalities. The burden imposed by the requirement makes criminal enforcement unnecessarily complicated and costly, and creates a barrier to legitimate trade, contrary to the requirements of TRIPS Article 41.

# KUWAIT

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Kuwait remain on the Watch List in 2013.<sup>1</sup>

**Executive Summary:** Over the past five years, copyright protection in Kuwait has improved for most industries due to cooperation with the Kuwaiti Ministry of Commerce (MOC), which has taken the primary role in enforcing copyright in the country. The market remained relatively small for creative industries, but recent movement places Kuwait in an important position in the launching of legitimate distribution services for music in the Gulf region. Piracy problems remain, and non-deterrence in the courts remains a key hurdle to limiting piracy in Kuwait. IIPA makes this filing to seek to address those problems as well as to highlight the copyright law reform process ongoing in Kuwait. The Kuwaiti government is considering a draft which appears intended to bring the current Copyright Law 1999 into compliance with TRIPS, create a more deterrent criminal penalties structure, and implements the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). IIPA recommends immediate passage of the draft Law, with changes including those outlined below to ensure full TRIPS compliance and compatibility with the WCT and WPPT, accession to the WCT and WPPT, and other important changes highlighted below to improve copyright protection and reduce piracy.

### PRIORITY ACTIONS REQUESTED IN 2013

#### Legislative

- Amend the Copyright Law to increase minimum and maximum fines and prison sentences, make them mandatory, and otherwise modernize the Copyright Law to meet the requirements of the TRIPS Agreement, implement (and join) the WCT and the WPPT, and update the law to effectively address online piracy.

#### Enforcement

- Investigate and where appropriate prosecute cases involving enterprise end-user piracy of software, as well as cases involving pirate software resellers and hard-disk loading of pirate software onto computers being sold in the market.
- Once the Copyright Law is amended to provide mandatory deterrent fines and prison sentences, these penalties must be imposed by the courts in criminal cases to drive piracy levels down and defeat recidivism.
- Enforcement and Internet takedowns by Kuwaiti authorities should be applied against pirate vendors who sell or advertise products which are prohibited by marketing restrictions (such as religious requirements) and rules. At present, enforcement is not even-handed and pirates effectively enjoy a state-enforced monopoly to sell illegal materials on the streets or over the Internet, given the lack of action under copyright or other grounds.

### COPYRIGHT LAW AND RELATED ISSUES

**New Draft Law Takes Positive Steps and Should be Enacted with Some Additional Changes:** Copyright protection in Kuwait is governed by the Copyright Law, Decree No. 64/1999 (effective February 9, 2000).<sup>2</sup> The Law has never been interpreted through implementing regulations. The law fails to comply with TRIPS in certain important respects and contains other problems and ambiguities, all of which have been recounted in previous IIPA

<sup>1</sup>For more details on Kuwait's Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2013SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

<sup>2</sup>Originally, the Copyright Law was passed as Decree Law No.5/1999 Relating to Intellectual Property Rights, published in the Official Gazette, Issue no. 414 in June, 1999. When a new National Assembly was elected in October 1999, it revoked all decrees including the Copyright Law, but in December 1999, the National Assembly voted again to reissue the code as Decree No. 64/1999, which was ratified by the Amir on December 25, 1999. Decree No. 64/1999, was published in the Official Gazette, Issue 445 on Jan. 9, 2000.



filings.<sup>3</sup> Kuwait, an original member of the WTO, has joined neither the Berne Convention (although the substantive portions of the Berne Convention are incorporated by reference into the TRIPS Agreement so Kuwait is bound by those) nor the Phonograms Convention. Kuwait should join those treaties as well as the WCT and WPPT. The Kuwaiti government has been stuck in a lengthy copyright law reform process since the early 2000s, with a new draft law emerging in 2012 apparently intended to meet TRIPS requirements and make other important changes. IIPA understands the new draft contains several important improvements over the current Decree and supports its immediate passage with some important changes.<sup>4</sup> The following are some comments based on IIPA's understanding of the draft law, and should be viewed as non-exhaustive and preliminary.

- **Clarifications Sought on New Technological Protection Measures (TPMs) Provisions:** The draft law apparently contains a new criminal remedy with respect to technological protection measures (TPMs). The law could be most effective and ensure full coverage under the WCT and WPPT if:
  - “TPMs” are defined as “any technology, device or component that, in the normal course of operation, controls access to, works or objects of related rights or restricts the exercise of an exclusive right provided in this Law”;
  - all acts of trafficking are covered, including “manufacture, assembly, selling, renting, putting into circulation, import, or export” and should not be limited to such acts undertaken with a commercial purpose as is apparently the case in the current draft;
  - there is coverage of any technology, equipment, device, component or instrument promoted, advertised or marketed for the purpose of, or designed, adapted, performed or prepared principally to, circumvent TPMs, or providing any service related thereto; and
  - civil and administrative remedies are provided against the acts defined in the draft law.
- **Clarifications Sought on Communication to the Public Right:** The draft law apparently partially implements the WCT and WPPT, for example, by helpfully confirming protection of reproductions regardless of their duration. The draft law could better implement the WCT and WPPT by ensuring that the definition of “communication to the public” includes “the making available of the work or object of related rights in such a way that members of the public may access it from a place and at a time individually chosen by them” and ensuring that this interactive right applies to performances as well as phonograms.
- **Omission of Provisions on Internet Service Provider Responsibility:** The draft law apparently does not, but should, include principles of liability to hold those who facilitate infringement on the Internet accountable, and should include specific provisions related to service providers, including notice and takedown (including in the P2P context), and should ensure that the law provides incentives for ISPs to cooperate with right holders against online piracy, including having in place effective and fair policies to deal effectively with repeat infringers.
- **Omission of Enumerated Exclusive Rights in Works:** The draft law apparently contains no specific enumeration of exclusive rights. This should be rectified.<sup>5</sup>

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<sup>3</sup>See, e.g., International Intellectual Property Alliance, Kuwait, at <http://www.iipa.com/rbc/2009/2009SPEC301KUWAIT.pdf>.

<sup>4</sup>Among other improvements, the draft law would: 1) significantly increase the penalty structure; 2) protect technological protection measures (TPMs) and otherwise implements the WCT and WPPT, although certain clarifying changes to the language on TPMs should be made to ensure full coverage of access controls and all forms of trafficking including circumvention services; 3) criminalize end-user software piracy; 4) fix point of attachment issues in the current Decree; 5) narrow exceptions from a previous draft; 6) provide a Berne-compatible presumption of ownership for works, but not a presumption of ownership as to related rights, and no presumption of subsistence of copyright, which should be added.

<sup>5</sup>For example, in a previous draft IIPA has been privy to, the following exclusive rights were specifically enumerated: 1) “the right to reproduce the work directly or indirectly in any manner...”; 2) “the rights to translate his work into another language, modify, summarize, elaborate, and adapt the work in any other form”; 3) “the right to convey his work to the public through public performance, theatrical acting, broadcast through wire or wireless transmission, including transmission that allows any member of the public to view the work at the time and place of the public’s choosing, such as making available his work in electronic sites upon request”; 4) “distribute the original or copy of the work to the public through sale or any other action which transfers ownership”; and 5) “rental for commercial

- **Confirm Presumption of Ownership, Including as to Related Rights, and Presumption of Subsistence of Copyright:** The draft law apparently provides a Berne-compatible presumption of authorship. The draft law could be greatly improved by ensuring a presumption of ownership, including as to related rights, and a presumption of subsistence of copyright.<sup>6</sup>
- **Confirm Availability of *Ex Parte* Civil Searches as Required by TRIPS:** The draft law contains injunctive relief, but apparently does not contain an express provision for *ex parte* orders. The drafters should confirm expressly that such court orders are available on an *ex parte* basis in line with TRIPS.
- **Provide for Adequate Civil Remedies as Required by TRIPS:** The current law only contains rudimentary discussion of compensatory damages, and there is no structure in place for statutory damages, attorneys' fees or costs. The draft law apparently contains no discussion of civil remedies, but should be amended to provide for compensatory damages, profits, statutory damages, and attorney fees and costs, as contemplated by TRIPS.
- **Draft Law Must Provide TRIPS-Compatible Remedy as to "Materials and Implements":** Article 42 of the current Law authorizes the court of urgent matters to confiscate all materials used for the illegal publication on "condition that these materials be fit only for republishing said work, performance, phonogram or broadcast program." making it incompatible with TRIPS which requires the seizure of materials and implements "the predominant use of which" has been in the infringement. The TRIPS language is clear and Kuwait must provide a TRIPS-compatible remedy.
- **"Registry" for Actions Taken May Violate TRIPS:** The draft law apparently includes a new "registry" for actions taken with respect to economic rights for works, performances, phonograms, and broadcasts. Assuming this amounts to copyright registration and is voluntary, it may be acceptable. As drafted, the provision apparently raises questions about whether both the registry as a prerequisite for "actions taken" and the costs involved with it, amount to an impermissible formality to protection which would be a blatant violation of TRIPS (and the Berne Convention).
- **Draft Law Should Ensure Exceptions are Appropriately Narrow and Meet International Treaties' Test:** Any exceptions adopted in Kuwait must meet international standards and the three-step test of the Berne Convention and incorporated into the TRIPS Agreement. The draft law, for example, apparently limits personal copying, which is positive, but should also not permit copies made "in the form of reprography of the whole or of a substantial part of a book or of a musical work in the form of notation."
- **Proposed Compulsory License May Not Be Permitted in Kuwait:** The current Decree contains, and apparently the draft law proposes, a compulsory license which is not permissible in Kuwait. The draft law apparently provides for anyone to apply for a license for the reproduction or translation of any work to meet "educational needs" or the "needs of public libraries or archive institutes." While apparently the draft requires "fair compensation" and is not permissible if it otherwise conflicts with the Berne three-step test (i.e., if it conflicts with the normal exploitation of the work or causes unreasonable prejudice to the legitimate interests of the right holder) it otherwise does not meet the stringent requirements of the Berne Appendix. There is a legitimate question as to whether the Berne Appendix, expressly reserved for "developing" countries, is available to Kuwait.
- **Moral Rights Provisions Should be Narrowed:** The moral rights provisions in the draft law could be further narrowed by 1) ensuring that the right to "publish" is in fact a right of first divulgation (apparently the word "first" is

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purposes of the original or copied work fixed in a sound recording or from a cinematographic work or computer program," except that "the exclusive right in a computer program shall not be applied unless the program itself was the essential subject of the rental."

<sup>6</sup>There should be a presumption that, in the absence of proof to the contrary, the natural person or legal entity whose name is indicated as the author, producer, performer, or publisher of the work, performance or phonogram in the usual manner, is the designated right holder in such work, performance or phonogram, and that, in the absence of proof to the contrary, the copyright or neighboring right subsists in such subject matter.

missing); 2) ensuring that the protection against modifications does not collide with the exclusive adaptation right of an author, i.e., prohibiting only those modifications or distortions which would “be prejudicial to the author’s honor or reputation,” and ensuring that any translation undertaken may only be done “with authorization”; and 3) removing any article allowing the author to “withdraw” a work from circulation, or allowing an author to make substantial changes after the economic rights have been transferred, since this would surely collide with economic rights as enumerated in TRIPS and Berne.

- **Draft Law Should Not Create Unreasonable Restrictions on Ability to Contract, or Divest a Joint Work Author of Its Rights Upon Death:** The draft law apparently restricts the ability of a joint work author to exploit the work without the authorization of the other, unless otherwise provided. Whether or not the contribution made by each of them can be separated from that of the other, joint work authors should be permitted to use the work, subject to an accounting, as is the global standard practice. Thus, the presumption should be reversed in the draft law. In addition, apparently the draft law divests the joint work author who dies first of its rights, devolving to the remaining authors. This should be deleted and the rights in such a work should devolve to the author’s heirs.
- **Definition of “Work” Should Not Be Tied to “Innovativeness”:** While this is undoubtedly in part a translation issue, the definition of “work” in Article 1 apparently still requires proof of an “innovative” character. The law should cover any literary, artistic, or scientific work, regardless of its type, form of expression, significance, or purpose, and can refer to the enumerated list of works as examples.
- **There is No Coverage of Rights Management Information (RMI):** To ensure full implementation of the WCT and WPPT, the draft law should cover rights management information, defining it properly, and prohibiting the unlawful tampering with or trafficking in RMI or works or objects of related rights which voluntarily employ RMI.
- **Current Laws Do Not Mandate or Foster Government Legalization of Software and Other Copyright Works and Sound Recordings:** The Kuwaiti government should clearly mandate that all government agencies use legitimate software and other copyright materials (works and sound recordings) and adopt software asset management best practices. If such implementation exists in other laws, regulations or decrees that we are not aware of, the Kuwaiti government should share this information.
- **Law Should Provide Protection for Encrypted Programs:** The Kuwaiti law should be amended to make it a criminal offense to manufacture, assemble, modify, import, export, sell, lease or otherwise distribute a tangible or intangible device or system, knowing or having reason to know that the device or system is primarily of assistance in decoding encrypted programs without the authorization of the right holder; or willfully to receive or further distribute an encrypted program knowing that it has been decoded without the authorization of the right holder. In addition to criminal penalties, civil remedies, including compensatory damages, should be available for any person injured by these activities.
- **Draft Law Should Extend Terms of Protection:** The Kuwaitis should take the opportunity presented by the draft law and follow the modern trend (more than 80 countries have greater than TRIPS minimum terms) to protect works for life plus 70 for works of natural authors, and 95 years from publication for audiovisual works and sound recordings.
- **Law Does Not Provide Parallel Import Protection:** In addition to its apparent failure to enumerate exclusive rights, the draft law does not, but should, provide an exclusive right to control the importation into Kuwait of copies of works, phonograms and performances (i.e., including parallel import protection).

## **PIRACY AND MARKET-RELATED ISSUES IN KUWAIT**

Piracy and some market-related issues (e.g., censorship practices which result in banning and, on occasion, confiscating legitimate product from legitimate stores) remain difficult problems in Kuwait, hindering legitimate businesses from taking hold and driving others out of Kuwait.<sup>7</sup> Piracy in Kuwait today consists of: 1) software piracy issues, including enterprise end-user piracy of software, by which small- and medium-sized enterprises in Kuwait, which are otherwise legitimate businesses, and the preloading of PCs with unlicensed or pirated software (so-called hard disk loading);<sup>8</sup> 2) pirate sales in the retail markets;<sup>9</sup> and 3) Internet or mobile (or mobile device) piracy. Right holders report some continued limited cooperation from the Ministry of Commerce and some results in the courts, although these are non-deterrent, largely due to the small numbers of cases being prosecuted and the extremely low criminal penalties achieved in such cases. With legitimate digital services launching in Kuwait (along with phone offerings such as the iPhone5), it is incumbent upon the Kuwaiti government to ensure an adequate legal and enforcement framework exists to deal with piracy.<sup>10</sup> In particular, it is critical that the Kuwaiti government be urged to swiftly pass the draft copyright law (discussed above) which will immediately impose much higher, more deterrent, minimum mandatory sentences and maximum penalties.

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<sup>7</sup>For example, in our 2011 filing, we noted that the Virgin Megastore in Kuwait City was closed for three months due to restrictive marketing requirements and censorship. Meanwhile, the same product for which the Virgin Megastore was closed (including recorded music, but also an estimated 25% of its inventory was books) was openly available on the streets in pirated copies as well as over the Internet through pirate sites. The product was considered too “subversive” for the legitimate store shelves but was allowed to be made available through illegal means, while no similar enforcement action was taken in this respect. The situation in 2012 only worsened. According to publishing industry reports, Virgin Megastore, whose inventory included 20-25% books, has now completely shut down operations in Kuwait due, in part, to restrictions on selling certain CDs, DVDs, and other copyrighted content stemming from increasingly strict censorship. A local story posted in April 2012 provides further details <http://www.arabianbusiness.com/virgin-megastore-pulls-kuwait-operations-store-close-end-feb-444522.html>.

<sup>8</sup>BSA | The Software Alliance’s 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Kuwait was 59%, representing a commercial value of unlicensed software of US\$72 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

<sup>9</sup>Much of this activity takes place in Hawalli, Bin Khalidoun street, and the Al Fahahil area. Industry regularly brings enforcement leads to the Ministry of Commerce in Kuwait. The industry reports very few retail raids in the past couple of years. In addition, for those raids which are run, greater speed and transparency are warranted in order to maximize their effectiveness.

<sup>10</sup>Noelle Manalastas, *Apple Opens iTunes Store in Middle East, Unveils iPhone 5 Release Date*, Al Arabiya News, December 5, 2012, at <http://english.alarabiya.net/articles/2012/12/06/253621.html>.

# LEBANON

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** Lebanon should remain on the Watch List in 2013.<sup>1</sup>

**Executive Summary:** IIPA has hoped Lebanon's development goals, including its World Trade Organization (WTO) accession process, could be moved forward, and that enhancement of intellectual property protection standards would play an important role within that context. IIPA has noted incremental progress in copyright protection in previous submissions and in recent testimony before USTR, and although problems remain, IIPA recently withdrew its petition to have the U.S. government review whether Lebanon is meeting its IPR protection and enforcement obligations under the Generalized System of Preferences (GSP) trade program. IIPA also recognizes the ongoing efforts of the U.S. and Lebanese governments in the Trade and Investment Framework Agreement (TIFA), and calls for copyright protection to play a prominent role in those discussions.<sup>2</sup> It remains premature, however, to remove Lebanon from the Special 301 list, given the importance of Lebanon establishing a proper legal framework for copyright protection, including online, and to fully implement its laws to reduce piracy and foster growth in the creative sectors in Lebanon.<sup>3</sup> In addition, some recent reports indicate that some in the government have questioned whether they should take IPR enforcement actions against small businesses.

### PRIORITY ACTIONS REQUESTED IN 2013

- Ensure that the special police bureau, the Cyber Crime and Intellectual Property Rights Bureau (CCIPRB) Unit, actively run raids against piracy targets, including enterprise end-user software piracy targets, and provide the Unit with:
  - *ex officio* raiding ability;
  - authority to employ investigative techniques to detect piracy practices (such as "hard-disk loading"); and
  - a regular operating budget.<sup>4</sup>
- Ensure that draft amendments to the Lebanese Copyright Law (1999), as proposed by the Ministry of Economy and Trade, include provisions compatible with TRIPS, WIPO Copyright Treaty (WCT), and WIPO Performances and Phonograms Treaty (WPPT), are passed by the National Assembly.
- Take all steps necessary to join the Berne Convention (Paris 1971 text), the WCT, and the WPPT.
- Provide seminars and other forums to sensitize judges to, and make them more expert in their understanding of, IP laws.
- Sensitize judges to the negative effects of piracy on: the Lebanese economy and foreign direct investment; right holders; and the reputation of Lebanon internationally. Combat current trend at the judicial level to tolerate counterfeiting and piracy in the country.
- Continue to press for a special IP tribunal, at least in Beirut.

<sup>1</sup>For more details on Lebanon's Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2013SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

<sup>2</sup>Since late 2006, the United States and Lebanon have been party to a Trade and Investment Framework Agreement (TIFA). See *United States and Lebanon Sign Trade and Investment Framework Agreement*, November 30, 2006, at [http://www.ustr.gov/Document\\_Library/Press\\_Releases/2006/November/United\\_States\\_Lebanon\\_Sign\\_Trade\\_Investment\\_Framework\\_Agreement.html](http://www.ustr.gov/Document_Library/Press_Releases/2006/November/United_States_Lebanon_Sign_Trade_Investment_Framework_Agreement.html). Copyright protection issues should be a permanent part of the TIFA agenda.

<sup>3</sup>In July 2007, the World Intellectual Property Organization released Roger Malki's report, *The Economic Contribution of Copyright-Based Industries in Lebanon* (published in World Intellectual Property Organization, *National Studies on Assessing the Economic Contribution of the Copyright-Based Industries*, July 2007, at 491-550). That report demonstrates that in 2005, the total copyright industries in Lebanon contributed around US\$1.04 billion to the annual gross domestic product (GDP), employed almost 50,000 workers, and contributed 4.75% to the GDP and 4.49% to overall employment, while the core copyright industries generated almost US\$556 million of value added, employed over 23,300 workers, and contributed 2.53% to the GDP and 2.11% to overall employment.

<sup>4</sup>Industry reports that the police and the prosecutors do not take any *ex officio* actions. BSA recently initiated a criminal complaint in the South of Lebanon that resulted in the raid of five outlets selling pirate software in the city of Saida in the South of Lebanon.



## **COPYRIGHT LAW AND RELATED ISSUES**

The Lebanese government remains stymied in efforts to amend its 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.<sup>5</sup> These include most notably the TRIPS Agreement, the latest text of the Berne Convention (Paris 1971 text),<sup>6</sup> 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.<sup>7</sup> It is important that the government 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 and performances).<sup>8</sup> At the same time, there remain deficiencies to address as part of Lebanon's WTO accession process and otherwise to ensure a more effective statute. These include (but are not limited to) the following issues:<sup>9</sup>

- 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.

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<sup>5</sup>See Tamara Qiblawi, *Beirut Boosts Efforts to Protect Copyright Owners*, The Daily Star, December 10, 2010, at [http://dailystar.com.lb/article.asp?edition\\_id=1&categ\\_id=3&article\\_id=122371](http://dailystar.com.lb/article.asp?edition_id=1&categ_id=3&article_id=122371).

<sup>6</sup>Lebanon currently adheres to the Rome (1928) text of the Berne Convention. In 2007, legislation was prepared and forwarded to the National Assembly to ratify the Berne Convention 1971 Paris text; passage of this legislation would be a welcome development.

<sup>7</sup>The 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.

<sup>8</sup>The law includes civil remedies and criminal penalties against copyright infringement, the possibility of confiscation of illegal products and equipment, and closure of businesses engaged in pirate activities. The law also outlaws the trafficking in satellite or cable decoders (i.e., devices that receive, or arrange the receipt of, unauthorized transmissions of broadcasts "dedicated to a section of the public who pay a fee to receive such broadcasting").

<sup>9</sup>A more detailed discussion of deficiencies in Lebanon's copyright law can be found in the 2003 Special 301 report, at <http://www.iipa.com/rbc/2003/2003SPEC301LEBANON.pdf>.

- 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 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.<sup>10</sup>
- 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 from publication in the case of sound recordings and audiovisual works.
- Enforcement measures should be strengthened to:
  - strengthen civil remedy measures to ensure adequate compensatory damages are available (measured by the legitimate retail price of the good infringed);
  - provide for pre-established damages;

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<sup>10</sup>Industry reports that there are no negotiations under way with ISPs, and the Lebanese government has shown no interest in involvement in any facilitation of such negotiations. The previous draft legislation had no notice or take down or ISP liability provisions.

- 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 incremental progress, piracy continues to harm right holders in Lebanon.<sup>11</sup> Piracy phenomena include widespread unlicensed software use by businesses, cable and pay TV piracy,<sup>12</sup> 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 the export of pirated books to Gulf states and Saudi Arabia, 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. Some industries report very high piracy levels.<sup>13</sup> It has been demonstrated that the Lebanese government is losing out as well due to piracy, in terms of lost taxes, social security contributions, and earnings.<sup>14</sup>



The picture of cable and satellite piracy in Lebanon (Source: The National)

The establishment of the Cyber Crime and Intellectual Property Rights Bureau (CCIPRB) was a positive step. Enforcement in Lebanon would improve if the following were implemented:

<sup>11</sup>Failure to mention any specific issue previously noted by the IIPA should not necessarily be taken as an indication that the problem has been resolved.

<sup>12</sup>Notwithstanding some noted improvements in previous reports, some accounts still indicate huge losses due to cable and satellite piracy in “the Arab region,” pegging losses at US\$500 million a year, and noting that Lebanon accounts for US\$123 million, as 99.9% of all pay TV feeds are reportedly illegal, “paid to pirate operators every year.” These statistics are according to media research firm Informa Telecoms & Media. The firm estimates only eight percent of Arab households that watch television actually pay for the services through cable or satellite. The remaining 92 percent of views in the region pirate the broadcast. In Egypt, around 10 million households are receiving pirated cable feeds. See Ben Flanagan, *Piracy Hijacks Growth of Pay-TV*, November 2011, The National, November 3, 2011, at <http://www.thenational.ae/business/technology/piracy-hijacks-growth-of-pay-tv>.

<sup>13</sup>BSA | The Software Alliance’s 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Lebanon was 71%, representing a commercial value of unlicensed software of US\$52 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

<sup>14</sup>In 2000, a study carried out by Statistics Lebanon, Ltd. between April and June 2000 estimated that, due to cable piracy alone, the Lebanese government lost approximately US\$38 million in 1999, including lost taxes, social security contributions, and the earnings of the Lebanese government if the cable industry was legitimate.

- The CCIPRB should be granted *ex officio* authority in order 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.
- With an increasing number of piracy issues involving computers (e.g., enterprise end-user piracy of software) or the Internet (Internet-based piracy, mobile device piracy), CCIPRB should continue to receive greater resources and assistance on computer crime issues.
- The CCIPRB Unit should be given a formal budget to help the Unit become even more stable and effective in its functioning.
- 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.

Unfortunately, the main problem continues to rest with the judiciary. 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; industry has asked repeatedly that the Chief IP Prosecutor allow the use of "informants," but this request has been denied.<sup>15</sup>

Another problem remains some evidence of unlicensed use of software by the Lebanese government. The government needs to lead by example and ensure that its own software usage is licensed, and then take an active role in driving local education, awareness and enforcement to combat software piracy in the country.

## **GENERALIZED SYSTEM OF PREFERENCES**

The Generalized System of Preferences (GSP) program promotes economic growth in the developing world by providing preferential duty-free entry for products from designated beneficiary countries and territories. The program is authorized by Congress through July 31, 2013. The GSP program has been important to Lebanon's economy. During the first eleven months of 2012, US\$36.7 Million in imports to the U.S. from Lebanon enjoyed duty-free treatment under the GSP Program, or more than 48.8% of Lebanon's entire imports into the U.S.<sup>16</sup> 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. Based on an IIPA Petition to "review" the country practices of Lebanon in the area of IPR to determine Lebanon's eligibility to continue to receive GSP benefits, USTR has had an active review ongoing, including into 2013. On January 14, 2013, IIPA formally requested that its petition be withdrawn in light of some progress made in Lebanon on enforcement and with

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<sup>15</sup>Industry has tried in recent years 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.

<sup>16</sup>During 2011, US\$35.8 million in imports to the U.S. from Lebanon enjoyed duty-free treatment under the GSP Program, or 45.1% of Lebanon's entire imports into the U.S.

respect to pay-TV piracy. IIPA's original Petition noted deficiencies in Lebanon's protection of copyright that caused economic harm to U.S. right holders that resulted in Lebanon failing to meet the GSP standard of providing "adequate and effective" copyright protection in practice.<sup>17</sup> IIPA notes continued deficiencies in the copyright law in Lebanon (discussed above) that call into question the adequacy and effectiveness of legal protection and hopes for the swift 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.<sup>18</sup>

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<sup>17</sup>International 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](http://www.iipa.com/gsp/2001_Jun13_GSP_Lebanon.pdf).

<sup>18</sup>IIPA has received positive indications that the Ministry of Economy and Trade (MOET) is in receipt of comments highlighting concerns with the current draft, many of which are consistent with IIPA's positions, and that as soon as the National Assembly decides to consider copyright amendments, changes contemplated will be made to improve the draft.

# MEXICO

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Mexico be retained on the Watch List in 2013.<sup>1</sup>

**Executive Summary:** Mexico is a very important export and foreign sales market for all of the U.S. copyright industries. But this market is being significantly limited by high levels of piracy of copyrighted works, which remained very high in 2012, for hard copy, and especially digital materials. Copyright piracy in Mexico takes various forms: CD-R and DVD-R burning of music; audiovisual and videogame discs; unauthorized camcording in theaters; unlicensed use of software by enterprises; unauthorized photocopying at universities; and widespread sale of all hard copy material in street markets.

The Mexican authorities, notably the Attorney General's Office (the PGR – responsible for federal criminal enforcement), the Mexican Institute of Industrial Property (IMPI – responsible for administrative actions under the Industrial Property and Copyright Law) and INDAUTOR (the author's rights institute responsible for registering copyrights, as well as enforcement), have worked well with rights holders from all of the copyright industries. Much of the successful enforcement has focused on hard copy piracy, but there have been very disappointing results against Internet piracy due to ineffective criminal and customs procedures. Most non-commercial digital platforms are generally not prosecuted at all, even though there is rampant piracy including peer-to-peer (P2P), and at social networking sites, at linking sites and in cyberlockers. Effective enforcement against digital piracy will require revisions to the Copyright Law, and authorities also need increased resources and training, and to coordinate their efforts. Even though cooperation among 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 (by appointing a commissioner) to develop a national strategy, and to coordinate federal, state and municipal enforcement activities, and address Internet piracy (coordinating both hard good and Internet piracy enforcement, including the federal commission on telecommunications, IMPI, INDAUTOR, and organizations representing Internet Service Providers (ISPs) and rights holders). In addition, the enforcement authorities are hampered by a number of statutory deficiencies in dealing with the size and scope of the digital piracy problem.

One of the key missing legal reforms is the full implementation of the WIPO digital treaties, including proper protection for technological protection measures (which is imperative for many copyright industries). 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 ISPs. Efforts to raise penalties to deterrent levels and to create a warning system for online users stalled in 2012. Some Internet-related legislative reforms (including a clear making available right), seem to be gaining momentum, and may move forward in 2013.

There were some notable positive achievements in Mexico in 2012. In November 2012, the Ministry of Economy became the first government body in the world to become certified under a program launched by BSA | The Software Alliance (BSA) to implement software asset management (SAM) best practices aligned with the International Organization for Standardization (ISO) SAM standard. This demonstrates a strong commitment by the Government of Mexico in promoting the use of legal software, and it sets an example for private enterprises on the importance of adopting IP protection best practices.

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<sup>1</sup>For more details on Mexico's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2013SPEC301HISTORICALCHART.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2013 global issues, see our cover letter at <http://www.iipa.com/pdf/2013SPEC301COVERLETTER.pdf>.



The copyright industries recommend several legal reform and enforcement measures (criminal, administrative and prosecutorial) for the Government of Mexico to take in order to improve its IPR regime. These measures are in keeping with Mexico's participation in the Trans-Pacific Partnership (TPP) negotiations, which aims to achieve a high-standard agreement on IPR, market access, and other key trade issues. Taking these steps would significantly improve market conditions for U.S. and Mexican rights holders and benefit the U.S. and Mexican economies as a whole, and, in particular, the critical sectors of our economies that depend on copyright protections.

## **PRIORITY ACTIONS REQUESTED TO BE TAKEN IN 2013**

The copyright industries recommend that the Government of Mexico take the following priority enforcement and legal reform measures:

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

- Develop a national *ex officio* anti-piracy campaign with a consistent focus and a year-round commitment 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 apply property forfeiture laws), and to focus on enterprise end-users of unlicensed software and other materials.
- Coordinate the various police agencies (the federal police (PFP), the Mexican Tax Administration (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 used by enterprises.
- Create a fully empowered and effective 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 the program for seizing goods arriving at local ports, destined for other countries, adopt a maximum quota on blank media importations used for the pirate market, and develop a strategy to identify infringers who import their goods using falsified information.
- 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 and training, and proper authority 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, to

waive or lower rights holder's deposit fees in instances of "obvious" piracy, and to expedite the process for destroying illegal materials.

- Provide INDAUTOR with more resources and facilities to increase and strengthen its mediation capabilities, particularly by providing more mediators and mediation rooms, and requiring more expeditious notices to rights holders.

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

- Encourage prosecutors to take *ex officio* actions against all forms of piracy (and especially online piracy), to focus on prosecuting individuals arrested in such actions, and to seek deterrent sentences, including jail time. Encourage the Supreme Court to issue an advisory on this point to criminal judges nationwide and for judges to act expeditiously on applications for search warrants. Encourage judges to treat copyright treaty obligations as self-executing (as the Supreme Court equated them with human rights), since the June 2010 constitutional amendments made international treaties pertaining to human rights self-executing.
- 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.
- 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. Training should focus on: technology, including circumvention devices, digital distribution and online piracy.
- Create specialized IP administrative circuit courts.
- Allow civil damages to be an additional award 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 Coalition for the Legal Access to Culture (CALC) initiative, and including notice and takedown procedures.
- Ensure that all relevant rights holders are entitled in law and practice to operate effectively through the collecting bodies of their choice in the licensing of broadcasting, public performance and other communications to the public.
- 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 at all levels (especially all state and municipal agencies).
- Strengthen administrative enforcement by: (1) providing tax crime prosecution of copyright infringement (when it implicates tax liability); and (2) increasing administrative sanctions.

- Amend the Customs Code to provide *ex officio* authority for the interception of shipments of suspected infringing material.
- Implement the recently enacted legislation to create a centralized customs registration database to assist with identification of infringing shipments.
- Adopt legal norms that create incentives for ISPs to cooperate with right holders in fighting infringement taking place over their networks or platforms, including *inter alia*: (1) legal incentives for ISPs to cooperate with rights holders to effectively deal with Internet piracy; (2) rules that clarify the illegality of providing services that are intended to promote the infringement of copyright and related rights; and (3) 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. The government has, reportedly, prepared a draft bill to provide a making available right.

## **COPYRIGHT PIRACY IN MEXICO**

Here is a snapshot of the nature of piracy and of the ongoing enforcement challenges in Mexico:

**Internet piracy:** As Internet use grows rapidly in Mexico, weak laws and enforcement are falling behind the technological advances causing high levels of piracy. There are now an estimated 42 million Internet users in Mexico, representing 36.5% of the population; in 2000, only 2.7% of the population had Internet access (according to [www.internetworldstats.com](http://www.internetworldstats.com)). Mexico has no clear secondary (ISP) liability law in place, and no formal notice and takedown procedures; either would substantially improve Internet enforcement if properly implemented.

For unauthorized downloads, the most prevalent digital platforms are P2P file sharing services, as well as sites dedicated to providing links to infringing hosted content, illegal distribution hubs (also known as cyberlockers), forums and social networks, BitTorrent index sites and blogs. Many sites are hosted mainly in the U.S. and Europe, but administered in Mexico. One example of that was demonoid.me. In its December 2012 Out-of-Cycle Review of “Notorious Markets” the U.S. Government praised the Government of Mexico for taking down the BitTorrent tracker demonoid.me last year; during its operation, it was a major source of pirated material worldwide, but the criminal investigation of the operators of that system has stalled.

The most widespread source of music piracy is P2P activity due to the migration of customers from hard copies to downloaded copies, with ARES, Gnutella and BitTorrent dominating (e.g., Megaupload, Fourshare and Rapidshare), 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). A Motion Picture Association (MPA) study (IPSOS survey) found very high Internet piracy rates continuing, as in recent years, with streaming, BitTorrent, cyberlockers and FTP servers currently causing the most serious problems. 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. BSA reports that downloading of software via illegal websites, P2P platforms and online auction sites is growing, with a rise in the market for illegal passwords, codes and key generators.

**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, La Fayuca, 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. IIPA continues to recommend focusing enforcement on these locales, with a more systematic approach to identifying and prosecuting the criminal organizations operating in these (and the other) markets. In fact, the U.S. Government named three of these Mexican markets to its 2012 “Notorious Markets” list: (1) Pulga Rio (Las Pulgas), calling it a “major hub for counterfeit and pirated goods” in the state of Nuevo Leon, operating despite law enforcement activities to decrease the number of vendors; (2) San Juan de Dios, describing it as an “indoor flea market” with over 80 vendors selling pirated first-run movies, music, videogames, software and counterfeit clothing and other items; and, (3) Tepito “reportedly the main warehousing and distribution center for pirated and counterfeit products” sold throughout Mexico.

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 2012 in the film industry remained at the same rate as in 2011 (so, at about 85%, and at about 71% for music). Flea market piracy remained at the same (high) levels as last year, and was especially problematic in the markets already mentioned (and others) 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, Lazaro Cardenas, 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 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 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 domestic manufacture of such devices, but not the distribution or sale thereof. Increasingly, consumers in Mexico source their circumvention devices from online auction and e-commerce sites. Vendors sell circumvention devices for approximately 350 to 500 Pesos (US\$28 to \$40), 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). BSA’s most recent software piracy study found that the PC software piracy rate in Mexico was 57% in 2011 (a 1% point improvement from 2010), with an estimated commercial value of unlicensed software of US\$1.25 billion.<sup>2</sup> Illegal software is most commonly available at street markets (by “carpeteros”), and, as noted, for downloads at online auction sites, specialized download sites and file sharing sites. In addition, “white box” vendors (small local assemblers or non-brand name vendors of computer hardware) continue to be a considerable source of software piracy, usually hard disk loading. As noted, one important step forward was the certification in November 2012 of the Mexican Ministry of Economy as meeting software asset management best practices under BSA’s Certification in Standards-Based Software Asset Management for Organization (CSS(O)) program. The CSS(O) program is an enterprise-level certification for software asset management based on a standard set by the International Organization for Standardization (ISO).<sup>3</sup> Certification under this program indicates that an organization is compliant with all of its software license agreements and that its management controls and procedures reflect the ISO standard. Certifications were also awarded to several other agencies associated with the Ministry of Economy, including the Federal Competition Commission, Federal Commission for Regulatory Improvement, Federal Attorney’s Office of the Consumer, and ProMexico. IIPA commends this important development and hopes it will set an example for other government ministries and the private sector to follow.

**Camcord piracy:** The illegal recording of films in Mexican theaters continues to cause significant harm to the U.S. motion picture industry, but in 2012, there were significant enforcement improvements against this type of piracy. In 2012, only three films were detected as stolen from Mexican theaters, down from the 37 in 2011. 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.

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<sup>2</sup>BSA | The Software Alliance’s 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Mexico was 57%, representing a commercial value of unlicensed software of US\$1.25 billion. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

<sup>3</sup> For more information about the CSS(O) program, see [www.bsa.org/CSSO](http://www.bsa.org/CSSO).

For book publishers, unauthorized photocopying of academic materials at copy shops in and around university campuses remains a concern. Universities should promote respect for copyright with the adoption of appropriate use and copyright policies, and encourage professors and teaching staff to promote the use of legitimate textbooks and materials to address this infringing behavior.

## **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 PGR’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; unfortunately, in 2012, the number of such actions decreased. In most cases, however, rights holders had to file (*ex parte*) complaints to commence cases, and had to build cases on their own and take their information to the authorities, before enforcement commenced. 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 investigate and audit companies for unlicensed software use given that such use can constitute a tax violation. Using this authority would serve as a powerful deterrent to unlicensed software use by business enterprises. In 2012, IMPI referred 150 cases to SAT for this purpose; IIPA recommends action on these cases as quickly as possible in 2013. The Scientific Police of the Secretaría 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. Some rights holders continue to report problems, although there were several instances where rights holders were notified, and did cooperate in the destruction of confiscated goods. 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 ongoing training programs with different agencies 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 2012:** In 2012, APCM reported good ongoing cooperation with PGR on film and music actions. Across Mexico against physical (hard good) piracy, IMPI conducted 1,200 inspection visits and 1,200 *ex officio* raids. The total amount of materials seized in police raids was as follows: 1,716,133 CD-Rs and 1,814,263 DVD-Rs (motion pictures); as a result of the inspections at cybercafes, 601 street raids, 711 warehouse raids, 106 laboratories and factory raids, 114 jukeboxes and 974 burners seized. In total, there were 118 arrests, 81 indictments, and 36 sentences in 2012 (and 69 individuals currently are in prison for IPR violations including over 35 defendants who have received sentences of four years or more). Against digital music piracy, in 2012, APCM reported 149,154 actions (down from 882,402 in 2011), consisting of 1,388 cease and desist letters to webpages; 30,740 for permalinks; 117,169 against cyberlocker links; 209 notifications to blogs and 1,039 links removed from YouTube (including 3,300 cyberlocker and streaming link notices from the motion picture companies). BSA reported that there were no criminal convictions in 2012 for software piracy (there were two convictions in 2011, and 20 criminal cases commenced). As noted, BitTorrent tracker demonoid.me was taken down with the cooperation of the Mexican authorities. Unfortunately, the criminal case against the operators of the service has stalled: the main operator of the service was initially imprisoned and materials used in the service were seized, but the operator of the service was subsequently released. The criminal case is ongoing.

Unfortunately, the ESA’s anti-piracy enforcement program did not see a sufficiently high level of activity from PGR in 2012. Despite a few successful raids in early 2012, the videogame industry was unable to secure any enforcement actions between July and December. A lack of coordination between the government agencies (PGR, specialized IP unit, and local police forces) was mostly to blame for this lack of enforcement against the distributors of infringing entertainment software. On several occasions the specialized IP unit obtained search warrants to raid premises known to harbor commercial-scale piratical operations. Unfortunately, those search warrants were not executed because police officers were never assigned to undertake raids. The entertainment software industry, along with the other copyright industries, recommend that prosecutors focus their efforts on major sellers, rather than on street vendors (further recommending that street vendor raids be used to investigate supply chains to target large-scale distributors, with follow-up criminal prosecutions, especially given the high rates of recidivism).

**Judicial issues:** A 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. 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.

## Civil Enforcement

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. BSA reported that in 2012, provisional measures to preserve evidence (i.e., the seizure of computers with allegedly infringing software) were used effectively by IMPI in administrative cases. One 2012 amendment to the federal judicial laws (including the Industrial Property Law) would permit the imposition of damages without a prior administrative infringement; IIPA recommends its adoption.

## 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 2012, IMPI undertook 1,383 actions against enterprises infringing software licenses (985 *ex officio* actions and 398 *ex parte* raids, also known as “full raids”) – an increase from 2011 (and with very good results in part because higher fines were imposed, and door closures generated immediate fines under a new law that took effect in 2012). As in recent years, BSA and other rights holder groups continued to report significant cooperation and coordination with IMPI on enforcement actions, resulting in more and higher fines. The 2012 law (in force, January 2012) is an important factor in improving IMPI enforcement: the law both increased penalties and established a presumption of infringement in cases where enterprises refuse entry to IMPI inspectors (so-called “door closures”). In 2012, there were 66 cases where fines were immediately imposed on “door-closers.” BSA reported improved cooperation on raids, evidentiary analysis, fines and seizures, as well as an increase in the number of IMPI actions in 2012 from prior years in general (and as noted, that door closures did result in automatic fines and the presumption of infringement). Many of the copyright industries continue to recommend that investigations be conducted more rapidly, and that evidence be preserved immediately upon discovery of a presumptive infringement (including evidence discovered by the authorities during inspections, even if that evidence is not listed on the inspection order). Several copyright industries reported that IMPI inspectors in 2012 did gather more detailed evidence than in prior years, and that this resulted in better outcomes for infringement cases (including higher fines). Last, it is recommended that IMPI empower its regional offices to conduct raids and seizures. BSA and IMPI signed collaboration agreements (and this resulted in the strong number of *ex officio* actions and raids, reported above); in one such agreement in 2012, more than 3,000 letters were sent to software users, to generate awareness regarding IP rights.

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 2012, the number of administrative procedures was increased from 80 to 100 per month.

In past two years, the MPA continued its anti-piracy campaign in cooperation with theater owners, by airing anti-piracy public service announcements in theaters (airing before screenings). Additionally, the short anti-piracy announcement was added onto many DVDs.

**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.

## **Online Enforcement**

**Legal reforms:** There are several legal deficiencies hampering effective online enforcement: first, there is no specific Mexican legislation establishing liability principles for ISPs in piracy cases. It is assumed that ISPs are subject only to the general liability principles contained in the Civil and Criminal Codes. 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 takedowns, but most said the ISPs were "not cooperating" or there was "very little cooperation" by the ISPs. 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. It is hoped that in 2013, ISP liability issues, and clear notice and takedown rules will be adopted. 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.

Generally, file sharing committed through P2P networks is not considered a serious legal violation by the civil courts. Article 424*bis* of the Criminal Code requires a profit motive as a prerequisite for criminal infringement, and as a result effective prosecutions in P2P cases are unavailable. APCM reports very few Internet piracy cases filed last year (and none pertaining to P2P piracy) mainly due to the lack of adequate criminal provisions as described above. For P2P file sharing, ISPs (especially Telmex, which has about 70% of the domestic broadband connections in Mexico) have, to date, been reluctant to take any actions, which is why legal reforms to address these issues are strongly recommended. The increase in broadband access in Mexico, without corresponding laws, has led to the surge in online piracy rates in recent years. ESA reports that in 2012, Mexico placed 14th in the world in the number of connections by peers participating in unauthorized file-sharing of select ESA-members titles on public peer-to-peer networks (Mexico was 28th in world in 2011).

It has been five 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). In 2009, 37 civil organizations representing copyright industries, other rights holders and collecting societies formally established the CALC to promote and defend copyrights and related rights threatened by physical and online piracy, working with different government entities and federal authorities. The CALC also focused on legislative reforms, including addressing private copy issues and promoting cooperation between rights holders and ISPs to address piracy in the online environment, but no legislation was advanced in 2012. 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 being drafted 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.

Six 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, and although a new “protocol” between PGR and Customs officials was expected last year, it did not materialize. 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 (and it conducted seven more training programs with customs officials in 2012 throughout Mexico), including detention notifications and seizures of pirated game product from diverse ports, in particular, Guadalajara and Monterrey. ESA notes that importers are now reducing the size of their shipments to avoid detection, making border enforcement even more critical, but more difficult. ESA did report an improvement in the level of support from Customs in dealing with shipments of circumvention devices.

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

**Federal Law on Copyright (1996, as amended):** 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 (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)) in 2002, but has yet to publish the WCT and WPPT Agreed Statements. Draft laws that were prepared in 2012, 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, January 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.

**Legislative Recommendations:** 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 (three to ten 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 of devices used for the circumvention of TPMs. The bill should include “acts” as well as devices, components and services. Mexico’s existing criminal law concerning TPM protection (Penal Code, Article 42) has proven ineffective because it only applies to the domestic manufacture of circumvention devices. Since such devices are made abroad and imported into Mexico, there is no criminal enforcement against retailers of these devices.
- A bill to adopt CALC proposals to promote cooperation between rights holders and ISPs.

# PAKISTAN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Pakistan be on the Watch List in 2013.<sup>1</sup>

**Executive Summary:** In 2012, the National Assembly unanimously passed the Intellectual Property Organization of Pakistan Act, 2012 (IPO Act), with effect from August 28, 2012.<sup>2</sup> This positive development came after the April 23, 2012 IPO Ordinance was promulgated by President Asif Ali Zardari, preserving the IPO Pakistan. Now, under the new Act, a permanent coordinating structure for intellectual property protection, awareness, and importantly, enforcement, is established in Pakistan. The Act not only creates a funding structure for the IPO, but vests it with enforcement authority. On top of this, the Act provides for the establishment of specialized IP “Tribunals” throughout the country, and which will adjudicate IP disputes through the use of cadres of trained judges in the areas of IP. This development, along with some improvements in enforcement cooperation noted in previous IIPA reports with low- or mid-level Pakistani authorities, and news that the Pakistani government is beginning to look at further amending the Copyright Ordinance, warrant an adjustment in the Special 301 ranking for Pakistan.<sup>3</sup> The potential exists to create a permanent and sustained IP structure which fosters effective protection for creators and a better climate for legitimate creative commerce in Pakistan. This potential development subsists in the face of continuing challenges over blatant physical piracy and rapidly expanding online and mobile piracy in the market. Publishers still face a market primarily dominated by piracy. In late April 2012, the United States and Pakistan held the sixth round meeting of the Trade and Investment Framework Agreement (TIFA) Council meetings under the 2003 TIFA.<sup>4</sup> Intellectual property enforcement is on the agenda, and the two sides have agreed to specific sectoral discussions on the margins of those meetings. We strongly urge the U.S. government to pursue the issues below in the next meeting forum.

### PRIORITY ACTIONS REQUESTED IN 2013

#### Legislative

- Modernize the Copyright Ordinance and join the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).
- Repeal the TRIPS-incompatible royalty-free compulsory license under Article 36(3) of the copyright law.
- Ensure mandatory minimum sentencing is available in courts and in the new IP Tribunals under the IPO Act, 2012, so that piracy cases have a deterrent effect.
- Amend landlord-tenancy laws that would hold liable and impose fines on landlords who rent out business premises to known or convicted pirates.

#### Enforcement

- Implement the IPO Act, 2012, fully funding the IPO, vesting it with enforcement authority, and establishing specialized IP “Tribunals” throughout the country. Establish enforcement arms of IPO in all provinces, since the

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<sup>1</sup>For more details on Pakistan’s Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2013SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years’ reports at <http://www.iipa.com/countryreports.html>.

<sup>2</sup>*Intellectual Property Organization of Pakistan Act, 2012*, effective August 28, 2012, at [http://www.na.gov.pk/uploads/documents/1349842758\\_779.pdf](http://www.na.gov.pk/uploads/documents/1349842758_779.pdf).

<sup>3</sup>In its 2012 Special 301 Report, the United States Trade Representative indicated the following about developments in Pakistan:

“Pakistan remains on the Priority Watch List in 2012. Pakistan continued its efforts on IPR enforcement, including through raids, seizures, and arrests by various enforcement authorities. However, widespread counterfeiting and piracy, particularly book and optical disc piracy, continue to present serious concerns for U.S. industry. Pakistan should provide ex officio authority to its enforcement officials, and should provide for deterrent-level penalties for criminal IPR infringement. Pakistan should also take the necessary steps to reform its copyright law.”

<sup>4</sup>*US, Pak Discuss Ways to Improve Indo-Pak Trade Ties*, OneIndia News, April 26, 2012, at <http://news.oneindia.in/2012/04/26/us-pak-discuss-ways-to-improve-indo-pak-trade-ties.html>.



provincial governments are more in control of budgets, allocation of resources, and calendars, and will therefore be in a better position to support IPO by having an administrative grip over enforcement.

- Ensure the Federal Investigations Agency (FIA) may take actions when piracy is suspected on an *ex officio* basis, i.e., without the need for a complaint.
- Take effective actions against Internet and mobile piracy, book piracy, enterprise end-user software piracy, and hard-disk loading piracy, including running inspections against businesses suspected to be engaged in the unauthorized use of software, bringing prosecutions where warranted, and seeking deterrent sentences at court and at the new IP Tribunals once they are established.
- Take steps to ensure judges and prosecutors recognize piracy as a serious commercial infraction against the state, including sentencing guidelines imposing mandatory minimum sentencing to avoid recidivism.
- Ensure oversight of SHO (local police) to maintain piracy logs in the jurisdiction, with penalties for not maintaining information if piracy takes place within the jurisdiction, and direct police and enforcement departments to cooperate fully with companies and businesses approaching them for IP violations.

## **PIRACY AND ENFORCEMENT ISSUES IN PAKISTAN**

Previous IIPA reports have discussed the many piracy and enforcement challenges faced in Pakistan.<sup>5</sup> The following provides brief updates on these and highlights growing Internet and mobile piracy, the continuing problems plaguing book publishers, the enduring problem of enterprise end-user software piracy, and overarching issues related to the enforcement system and the courts.<sup>6</sup>

**Growing Internet Piracy:** According to the International Telecommunications Union (ITU), Internet penetration in Pakistan stood at close to 9% in 2011, up from 6.5% in 2006,<sup>7</sup> while mobile phone penetration reached 61% (108.9 million).<sup>8</sup> Broadband penetration remains relatively low, as 2010 statistics indicate only 0.4% of Pakistanis enjoy fixed-line broadband (737,778), according to the ITU, although according to some indicators, wireless broadband is beginning to pick up,<sup>9</sup> and according to Internet Service Providers Association of Pakistan (ISPAK), the estimated number of Internet users *via* mobile phones has reached 15 million.<sup>10</sup> As a result, Internet piracy in Pakistan continues to increase. Pre-release music, movies, software, games, and publications are all available through online portals, including some of the most notorious websites in the world for online piracy.<sup>11</sup> Reference books, online journals, and trade books are being digitized and provided by schools. Thus far, few steps have been taken to address increasing online piracy or illegal digitization of copyright materials.

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<sup>5</sup>Please see previous years' reports at <http://www.iipa.com/countryreports.html>.

<sup>6</sup>In the government of Pakistan's February 2010 review of its performance on IP issues throughout 2009, the government noted, "IPO-Pakistan, since its establishment in 2005, have developed a coordination system with enforcement agencies especially Federal Investigation Agency (FIA), Pakistan Customs, Pakistan Electronic Media Regulatory Authority (PEMRA), Police Department and Private Sector Detection Agencies." See Government of Pakistan, *2010 Special 301 Review: Progress Made by Pakistan in IPRs Enforcement During 2009*, February 25, 2010, submitted to regulations.gov (on file with IIPA).

<sup>7</sup>ITU internet penetration statistics for Pakistan were reexamined and calibrated in 2011 due to "a discrepancy in past data in which the percentage of internet users in Pakistan was found to be an overestimation compared to countries with similar characteristics." See Freedom House, *Freedom on the Net 2012 - Pakistan*, 25 September 2012, available at: <http://www.unhcr.org/refworld/docid/5062e89c1e.html>, accessed January 10, 2013.

<sup>8</sup>For example, according to Point-Topic, Pakistan's DSL connectivity grew from 173,500 to 188,500, and cable modem connectivity grew from 118,000 to 132,000 in the third quarter 2009. Pakistan had the sixth highest quarterly growth of broadband connections in the world during the same period, and was the tenth highest in terms of annual growth (third quarter 2008 to third quarter 2009).

<sup>9</sup>International Telecommunication Union, *Fixed Broadband Subscriptions 2000-2011*, at <http://www.itu.int/ITU-D/ict/statistics/material/excel/Fixed%20broadband%202000-2011.xls>, accessed on January 10, 2013.

<sup>10</sup>Muhammad Yasir, *Internet Users Cross 25m Mark*, Daily Times, September 20, 2012, at [http://www.dailytimes.com.pk/default.asp?page=2012%5C09%5C20%5Cstory\\_20-9-2012\\_pg5\\_15](http://www.dailytimes.com.pk/default.asp?page=2012%5C09%5C20%5Cstory_20-9-2012_pg5_15), accessed on January 10, 2013.

<sup>11</sup>USTR listed *warez-bb* in its latest Notorious Markets Report, it as a "forum site, which is ... described as a hub for the sharing of copyrighted works, including pre-release music, software and video games" and as a site that "has a global reach, and is among the top 200 sites visited in Belgium, Croatia, Serbia and Pakistan, according to Alexa.com." USTR also listed *Kat.ph* (formerly *kickasstorrents*) as "notable for its commercial look and feel" and as being "ranked by Alexa.com among the top 135 most visited sites in the world, and within the top 40 sites visited in the Philippines, Pakistan and Sri Lanka." See United States Trade Representative, *Out-of-Cycle Review of Notorious Markets*, December 13, 2012, at <http://www.ustr.gov/sites/default/files/121312%20Notorious%20Markets%20List.pdf>. IIPA, in its Notorious Markets filing to USTR, listed *1channel.ch* (Estonia) (previously *Letmewatchthis.com*) as "a particularly popular linking site in Canada, the UK, Ireland, and Pakistan, coming in the top 200 most visited sites in those countries according to Alexa.com." See International Intellectual Property Alliance (IIPA), *Submission Re: IIPA Written Submission Re: 2012 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 77 Fed. Reg. 48583 (August 14, 2012), Docket No. USTR-2011-0011, September 14, 2012, at [http://www.iipa.com/pdf/2012\\_Sep14\\_Notorious\\_Markets.pdf](http://www.iipa.com/pdf/2012_Sep14_Notorious_Markets.pdf).

**Book Piracy Worsened in 2012:** Pakistan remains a market saturated with pirate books, consisting of both print piracy and widespread unauthorized photocopying. The Urdu Bazaars in Karachi and Lahore remain major sources of pirated books in the country, and were listed by USTR as “Notorious Markets” in its review conducted in late 2012.<sup>12</sup> Pirates now focus attention on producing unauthorized photocopies made from one master/source copy legitimately purchased online or overseas, to which a higher-quality color-printed book cover is then affixed. The printing of title covers has taken on a new dimension, since pirates now often print the pirated book obscuring the authors’ names, publishers’ names, logos, ISBN numbers, etc. Print piracy consists of smuggled books from Iran and Afghanistan by land, or overruns by legitimate printers in Pakistan. Unauthorized India-only editions are also being imported into Pakistan. All types of books are pirated, from English language novels to fiction and non-fiction trade books to higher education textbooks. The publishers operating in Pakistan report no improvement in the overall situation in Pakistan.

Piracy remains serious on university campuses, estimated at 90% piracy, where campus book stores stock pirated books, and some university professors even inform pirates of the books they intend to assign to their class, which are then produced as pirated copies in bulk for the class. Some medical titles have been pirated, usually in one color, so they have misleading and inaccurate illustrations. The piracy of English language teaching (ELT) books used at universities and language schools is of particular concern (language schools charge a consolidated fee covering tuition and the cost of books, but then provide only the pirated versions of ELT books). Unauthorized compilations in the form of course packs are also on the rise. The potential market for elementary and high school materials in English (Elhi market) is immense given the number of children in English language schools, but unfortunately, these schools routinely use pirate versions of books.

**Royalty-Free Reproductions of Books Must Cease:** While it is reported that the Ministry of Education’s National Book Foundation (NBF) has recently ceased the unauthorized reproduction of books under the guise of a royalty-free compulsory license, under Section 36(3) of the Copyright Ordinance (as amended in 2000), publishers ask that NBF confirm this change with a written commitment to refrain from any further unauthorized reproduction of copyrighted works. Moreover, because Section 36(3) of the Copyright Ordinance violates the Berne Convention and TRIPS, the government should likewise commit to repeal this section of the Copyright Ordinance.

**Courts Require Sensitization to IP Theft as an Economic Crime; New IP Tribunals Provide Hope:** The copyright industries’ experiences with the courts in Pakistan have been mixed over the years, but in general, criminal court cases involving piracy have not resulted in either timely or deterrent outcomes. Maximum penalties are non-deterrent to begin with, and there are no minimum penalties. As a result, magistrates use their discretion in favor of the accused by imposing fines as low as a few hundred Rupees (PKR100 = US\$1.01) and no jail sentences. It is reported that there are more than 20 cases in Karachi, Lahore and Rawalpindi lower courts that have been pending for multiple years. As such, prosecution of cases still appears subject to chronic delays inherent in the system and the judiciary remains understaffed with an enormous backlog of cases. To help remedy this situation, publishers hope that the government of Pakistan will implement the IPO Act by setting up a sufficient number of specialized IP Tribunals in a timely manner. Publishers note that there is still a lack of clarity as to the jurisdiction of these IP Tribunals with respect to the Pakistan Criminal Code, but urge the government of Pakistan to afford authority over such cases to these specialized courts.

**Influence of Organized Crime in Piracy:** There have been several reports of disturbing incidents involving organized book pirates who may have influence with local political party leaders and area police. Industry representatives have received threatening phone calls from pirates. In Karachi, an Urdu Bazaar shop keeper who had been raided is suspected of being involved in property damage against one of the publishers’ sales outlets. In Lahore, similar incidents occurred, including one in November 2010, resulting in injuries to FIA officials. These

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<sup>12</sup>USTR wrote in its December 13 report, “The Urdu Bazaars in Karachi and Lahore reportedly remain the main sources of pirated books in the country, where book piracy is widespread and extends beyond such bazaars.”

incidents are the exception in recent years, since persuasion, sustained campaigns, and dialogue have led to greater cooperation and assistance from the unions running the bazaars.

**Software Piracy Is Endemic:** Despite significant public awareness and enforcement drives by BSA | The Software Alliance over the past several years, software piracy, including by businesses that use unlicensed software, remained a serious problem in 2012. Pakistan has one of the highest software piracy rates in the world, at 86% in 2011, with the commercial value of such unlicensed software rising to \$278 million that year.<sup>13</sup> Reducing piracy levels would not only help software copyright owners create a legitimate market in Pakistan, but would also lead to very positive economic benefits for Pakistan.<sup>14</sup> Unfortunately, inspections are not being run against businesses suspected to be engaged in the unauthorized use of software, and prosecutions are not being brought where warranted. In addition, while many prosecutions were brought in previous years against those engaging in hard-disk loading of pirate software onto computers, the slow pace of court processes and lack of deterrent sentences has meant those engaging in this activity are also not deterred. By contrast, the government has taken some steps over the years to legalize government use of software, and software procurement rules are in place to ensure that legitimate software prices are quoted with tender offers to supply hardware.

## **COPYRIGHT LAW AND RELATED ISSUES**

**Copyright Reforms Should Move Forward:** Copyright protection in Pakistan is provided under the Copyright Ordinance, 1962 (as last amended in 2000). The Ordinance provides generally strong tools to fight piracy.<sup>15</sup> Also, copyright offenses are cognizable, meaning the FIA can act on its own cognizance (*ex officio*), and non-bailable (meaning defendants need not be brought before a magistrate to determine whether bail is appropriate). Unfortunately, the *ex officio* authority is not exercised by FIA. Other deficiencies in the Ordinance should be remedied through amendments, and the law should otherwise be modernized to make it compatible with the WCT and WPPT, in line with the IPO's stated intent to implement these treaties.<sup>16</sup> The following enumerates some of the more significant changes that should be contemplated in amending the Ordinance:

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<sup>13</sup>BSA | The Software Alliance's 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Pakistan was 86%, representing a commercial value of unlicensed software of US\$278 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA's 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

<sup>14</sup>A 2008 study by IDC and BSA demonstrated that a 10 point reduction in software piracy from 2008 by 2011 (i.e., from 86% to 76%) would have delivered more than 11,700 new jobs, US\$23 million in tax revenues for the Pakistani government, and US\$160 million in economic growth in Pakistan. BSA and IDC, The Economic Benefits of Lowering PC Software Piracy: Pakistan, January 2008, at [http://www.bsa.org/sitecore/shell/Controls/Rich%20Text%20Editor/~media/Files/idc\\_studies/bsa\\_idc\\_pakistan\\_final%20pdf.ashx](http://www.bsa.org/sitecore/shell/Controls/Rich%20Text%20Editor/~media/Files/idc_studies/bsa_idc_pakistan_final%20pdf.ashx).

<sup>15</sup>Previous IIPA submissions have discussed the current Ordinance in greater detail. Three essential remedies exist in Pakistan for copyright infringement: i) civil remedies, including permanent injunctions, damages and wrongful profits, seizure of goods, etc.; ii) administrative remedies through IPO Pakistan, Customs, or the FIA; and iii) criminal prosecutions through the Police. Criminal penalties for knowingly infringing or aiding and abetting infringement of copyright include imprisonment of up to 3 years, and/or a fine of up to PKR100,000 (around US\$1,000) (double for a recidivist). Section 74-A provides for restitution to the complainant (50% of the fine) in addition to any civil damages. In case an offense is committed by a company, every person who was in charge of and responsible to the company for the conduct of the business at the time the offence was committed is deemed guilty of the offence and punished accordingly. The Ordinance also includes, as an example, provisions enabling the Registrar to monitor exports, with the ability to inspect and seize pirated goods leaving Pakistan. The 2010 Pakistani government Special 301 filing also indicates that improvements have been made to Customs provisions in the Customs Act, 1969, including 1) documentary proof may be submitted by any right holder to the Preventive Collectorate, Karachi to seize a consignment which is violating IP rights; 2) Sections 15 and 16 of the Customs Act, 1969 have been amended to include IPR violations and counterfeit goods under the list of items that are prohibited for import and export, for which strict penal actions such as detention, seizure and confiscation are available remedies under Section 156 of the Act; and 3) some "books" were seized in 2009, although the main focus of Customs appears to be on counterfeit goods, not copyright piracy. See Government of Pakistan, 2010 Special 301 Submission, *supra* note 6.

<sup>16</sup>We note here the support of The Pakistan Software Houses Association for IT and ITES (P@SHA) and Center for International Private Enterprise (CIPE) in their 2009 report of recommendations. Included in the IP recommendations is for the Pakistani government to "[a]mend the Copyright Ordinance 1962 to provide for protection as available under the WIPO Treaties and additional provisions as provided under the Digital Millennium Copyright Act 1998. See CIPE and P@SHA, Business Agenda for the Pakistan IT & ITES Sector 2009, at 10. The report usefully notes, "[t]he need for Pakistan to invest in its creativity ... is so important that it directly equates to our strategic national interest," and "IPR protection of digital rights is vital for not just FDI, but also for Pakistani businesses and for the protection and security of the intellectual capital and innovation of Pakistan's dynamic youth, researchers, and entrepreneurs." *Id.* at 10-11.

- **Provide Deterrent Criminal Penalties:** Criminal penalties remain far too low to deter piracy, and in part to remedy this, the Ordinance should be amended to provide minimum jail sentences and fines for crimes involving copyright infringement. For example, if the minimum fine were increased to PKR500,000 (around US\$5,000), reasonable by any estimation, the law would stand a much better chance at achieving deterrence.
- **Remove Berne-Incompatible Royalty-Free Compulsory License for Books:** One of the most significant deficiencies in the Ordinance is Section 36(3) that allows a royalty-free compulsory license of books. Specifically, it provides, “[t]he Federal Government or the Board may, upon an application by any government or statutory institution, in the public interest, grant a license to reprint, translate, adapt or publish any textbook on non-profit basis.” Included in “government or statutory institution” is the National Book Foundation (NBF), which, as noted, has previously engaged in the unauthorized reproduction of books under the guise of this license. This royalty-free compulsory license violates the Berne Convention and TRIPS and Pakistan must delete it from the Ordinance.
- **Fully Implement the WCT and WPPT:** The Ordinance should be amended to fully implement the WCT and WPPT, including: 1) ensuring broadcasting and public performance rights for phonogram producers; and 2) providing an exclusive communication to the public right, including the interactive “making available” right. The amendments should also protect against the act or service of circumventing technological protection measures (TPMs) used by right holders to protect their works from unauthorized access to, or exercise of exclusive rights in, works or other subject matter of copyright, or the trafficking in devices, components, or other technologies used, aimed, or promoted, to circumvent such TPMs.
- **Address Online Infringements:** Given the rise of Internet piracy in the country, amendments should provide proper incentives for service providers in the online space to cooperate with right holders to takedown infringing content (including a robust notice and takedown system) and deal with non-hosted infringements, including an effective and fair treatment of repeat infringers. The Prevention of Electronic Crimes Ordinance 2007, which criminalized certain computer activities, lapsed in the first quarter of 2010 and has not been re-enacted, but in any event, the laws should be amended to provide a remedy for copyright infringement consistent with the Council of Europe Cybercrime Convention (2001).<sup>17</sup>

**New Intellectual Property Organization of Pakistan Act, 2012:** The IPO Act, 2012, was enacted last year, with effect from August 28, 2012. This Act creates a permanent coordinating structure for the IPO as well as a funding structure, and vests IPO with enforcement authority, authority over strengthening intellectual property protection, and public awareness for the importance of IP protection in Pakistan. The Act provides for the establishment of specialized IP “Tribunals” throughout the country, which will adjudicate IP disputes through the use of cadres of trained judges in the areas of IP. Specifically, under Article 13 of the Act, “Powers and functions of the Organization,” Clauses (xviii) through (xx) deal with enforcement.<sup>18</sup>

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<sup>17</sup>The Council of Europe Cybercrime Convention contains, in Article 10, “Offences related to infringements of copyright and related rights,” an obligation to “adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the infringement of copyright [and related rights] ... where such acts are committed wilfully, on a commercial scale and by means of a computer system,” and Article 11 contains the obligation to “establish as criminal offences under its domestic law, when committed intentionally, aiding or abetting the commission” of Article 10 offenses.

<sup>18</sup>Article 13(xviii) gives IPO the power to “initiate and monitor the enforcement and protection of intellectual property rights through designated law enforcement agencies of the Government, Federal or Provincial, and collect related data and information.” Article 13(xix) gives IPO the power to “initiate and conduct inquiries, investigations and proceedings related to offences in the prescribed manner.” Article 13 (xx) gives IPO the power to “refer matters and complaints, related to offences under the laws specified in the Schedule [including the Copyright Ordinance], to the concerned law enforcement agencies and authorities as may be necessary for the purpose of this Act.”

## **GENERALIZED SYSTEM OF PREFERENCES**

Pakistan enjoys preferential trade benefits under the Generalized System of Preferences trade program. One of the discretionary criteria of the program is that the country provides “adequate and effective protection for intellectual property rights.” In 2011, almost US\$130.7 million worth of Pakistan’s goods entered the U.S. under the duty-free GSP code, accounting for more than 3.4% of its total imports to the U.S. In the first eleven months of 2012, more than \$175 million of Pakistan’s exports to the U.S., or 5.2% of its total exports to the U.S., received duty-free treatment under the GSP code. Pakistan needs to continue to endeavor to meet the adequate and effective test under the statute to remain eligible to receive favorable treatment under the GSP program.

# ROMANIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:**<sup>1</sup> IIPA recommends that Romania remain on the Watch List in 2013.

**Executive Summary:** Romanian authorities are active partners with the private sector in promoting anti-piracy messages, but enforcement against rampant piracy worsened in 2012. Piracy remains widespread in Romania for all forms of copyright works, and the problem has now firmly moved to the online space, where even international pirates seek safe haven from more unwelcoming terrain elsewhere in Europe. IIPA expresses its appreciation for the very active and supportive role of the U.S. Embassy in Bucharest, providing training for law enforcement, coordinating with the private sector, and emphasizing with the Romanian Government the need to prioritize IPR protection and enforcement in legislative and law enforcement efforts. The Romanian Government has put in place a specialized IP prosecutor and police team to tackle intellectual property crimes, and the newly appointed prosecutor has cooperated in U.S. Embassy and private sector trainings and conferences. As a result, two new Internet cases have been opened for criminal investigation. Reports of cooperative attitudes of police and piracy experts are appreciated, but much remains to be accomplished within the overall challenging enforcement environment in Romania. We encourage the Romanian Government to adapt the country'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 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 2013

- 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 all newly appointed specialized police as well as local law enforcement for investigations and actions involving piracy on the Internet.
- Ensure that specialized IPR prosecutors operate in a transparent manner, communicate with rights holders' representatives, and provide results by swiftly initiating and indicting criminal infringement cases.
- 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.
- With respect to the Romanian Copyright Office (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.

<sup>1</sup>For more details on Romania's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2013SPEC301HISTORICALCHART.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2013 global issues, see our cover letter at <http://www.iipa.com/pdf/2013SPEC301COVERLETTER.pdf>.



## **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. Romanian users increasingly access illegal content at home and to download and burn copyrighted materials — music, entertainment software, films and business software. Large amounts of video files are shared over the networks. The problem has so pervaded Romania's webspace that pirate Internet services in the country are now serving users both in and out of Romania.

The Motion Picture Association of America (MPAA) reports that the scope of Internet piracy of audiovisual content in Romania now reflects 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. Several high-profile pirate websites have found shelter in servers based in Romania, such as movie2k.to (Alexa.com worldwide ranking #326), rutor.org (#1,431), 1337x.org (#1,496), kinozal.tv (#1,878), tubeplus.me (#2,500), mygully.com (#5,347) and sceper.ws (#7,969). Film industry representatives report that the lack of Internet enforcement in the face of these problems has played a major role in deterring investors from developing a legal online market for audiovisual products. Even more troubling, these illegal services based in Romania are the source of audio and video camcords that have a direct impact on the legal offer online and legitimate digital markets in other countries, and serve as the foundation of a still-present illegal DVD market worldwide.

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) continues to see problematic levels of peer-to-peer (P2P) piracy in Romania. In 2012, Romania once again 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.

BSA | The Software Alliance (BSA) reports a modest decrease in Internet-based piracy of software in Romania in 2012, appearing most commonly via the illicit use of P2P file sharing, in particular via BitTorrent protocols. Research shows that most often individuals will download (or upload) pirated software at home, both for home use and for distribution or use in the workplace.

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. In 2012, the music industry reports that there were 333 websites identified with pirate content, 204 of which were closed, 96 were reported to IFPI, and 33 of which fall under the competency of Romanian authorities. There are currently 17 websites offering legitimate music content including legal streaming sites.

**Enterprise End-user Software Piracy:** BSA reports that the software piracy rate in Romania was 63% in 2011, representing a commercial value of unlicensed software of \$207 million.<sup>2</sup> This includes continued widespread unlicensed software use by businesses and other enterprises. 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, a trend attributable to both the increase in Internet piracy and enforcement actions against places of sale. Hard-disk loading, an activity that involves the installation of pirated software programs into PCs for delivery on purchase, has decreased somewhat thanks to software industry representatives that conduct surveillance of the PC market through sample purchases, and as a result of deterrent sanctions issued by law enforcement. 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 migrating online as Romanians have turned to downloading pirated PC games at home.

## **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:** In June 2012, Romania adopted a new law to implement the EU Data Protection Directive, Law no. 82 of 2012. The new law grants to authorities the ability to require ISPs to implement data retention policies, such data to be disclosed only in cases of severe criminal offenses – but copyright crimes are not within the scope of the new provision. Further amendments to the legal framework for data retention are needed to allow enforcement authorities to collect needed evidence in anti-piracy investigations, regardless of whether piracy is undertaken by a criminal organized group as defined in Romania’s organized crime laws.

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 required Romanian ISPs to retain their subscriber and network data for six months and to communicate it to the authorities, upon court order, in cases of crimes committed on the Internet or through other communication systems. While the Constitutional Court may have had justification to strike the 2008 law, the decision created a gap in enforcement provisions that has hindered the ability of Romanian police authorities to seek the identities of online infringers. Since the law was repealed, 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, ISPs in Romania have not cooperated in such actions citing the need to address data retention.

**Internet Cooperation:** In December 2012, the Romanian Copyright Office (ORDA), with the support of WIPO and of the General Public Prosecutor’s Office and with the participation of police, rights holders, and ISPs, organized an event addressing use of copyrighted content over the Internet. Many issues were addressed in an

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<sup>2</sup>BSA | The Software Alliance’s 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Romania was 63%, representing a commercial value of unlicensed software of US\$207 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

attempt to open honest and productive dialogue among the parties. Currently, however, there are still 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. Today, MPAA reports that ISPs are wholly uncooperative to requests from members of the film industry to remove infringing content.

The Romanian Copyright Law addresses the unauthorized uploading and downloading of copyrighted works from the Internet, but is not clear as to the responsibility of ISPs specifically.<sup>3</sup> Meanwhile, Romania's Law on Electronic Commerce (Law No. 365 of 2002) provides that an ISP should suspend Internet access of a client upon notification by the authorities that the client has engaged in an act of infringement. The ISP can suspend a client's services only through the disposition of the designated public authority (ANRCTI) or through a court order, based on a complaint of an interested party. Unfortunately, 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 what criteria the ISPs must consider the information to be illegal or infringing, which may cause problems in practice. The law also provides for the general obligation of ISPs to alert authorities about the apparently illegal activities of their clients; should an ISP fail to do so, they are subject to administrative liability. Rights holders are concerned that this very broad and unspecific obligation is unenforceable.

**Copyright Law Reform:** The 1996 Romanian Copyright Law has been amended a number of times in the past decade, including in 2004, 2005, and 2006,<sup>4</sup> often to bring the law into compliance with EU Directives. The overall legal structure is generally good but unfortunately Romanian law is not yet fully compliant with the WIPO Copyright Treaty (WCT), the WIPO Performances and Phonograms Treaty (WPPT), 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 (TPMs), does not appear to prohibit acts of circumvention, but only preparatory acts of circumvention and therefore fails to implement the WIPO Treaties and the EU Copyright Directive.

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. An issue long faced by the software industry is 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 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. We understand the 2010 draft amendments to the Copyright Law addressed this issue and hope it will be adequately addressed in any final amendments enacted. 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. In September

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<sup>3</sup>See Article 1432 of the Copyright Law (a crime punishable with imprisonment from six months to three years includes the act of the person who, without the consent of the rights owner and knowing or having to know, permits, facilitates, provokes or hides an infringement of a right provided for in this Law.)

<sup>4</sup>For a detailed history of these amendments, see the IIPA's 2010 Report at <http://www.iipa.com/rbc/2010/2010SPEC301ROMANIA.pdf>.

2012, the draft was approved by the Senate automatically (according to Parliamentary procedures, if the Senate fails to discuss a legislative draft by a certain deadline, it is automatically deemed adopted and it moves to the Chamber of Deputies, which then must expressly discuss, adopt, change, or dismiss the bill). BSA submitted comments to the Ministry of Culture when the draft was published in 2010, and, again, with the Romanian Copyright Office in September 2012, and other copyright sectors have submitted comments, but still there is no schedule for the draft to move forward.

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 price of the holograms includes an additional 10% fee for a national cultural fund, while for example other additional fees (3% added to the sale price of DVDs or other tangible supports) are paid by the film distributors for the film fund administered by the Film Office. The copyright industries also have voiced concerns with a November 2008 decision regarding ORDA that added more provisions regarding tariffs, the use of expert reports, and the use of the “encouragement” fund for ORDA personnel. Romania should (1) abolish the statutory hologram system; (2) make the track registration system voluntary and free of charge; and (3) substantially reduce ORDA’s tariffs and allow rights holders’ organizations to act as court experts in copyright infringement and piracy cases.<sup>5</sup>

**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 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. Despite the fact that the software industry has resubmitted drafts of the proposals to ANRMAP and to the Ministry of Communications and Information Society under the most recent government change, the process of amending the Ordinance continued to be stalled in 2012. This effort should be encouraged to move forward including the software related provisions.

**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 early 2014. 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. Also, 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. There have also been proposals for a new civil procedure code that enters into force on February 15, 2013, including some civil measures in the IPR field.

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<sup>5</sup>For further details on this long-standing problem, see the IIPA’s 2010 Report at <http://www.iipa.com/rbc/2010/2010SPEC301ROMANIA.pdf>.

## **COPYRIGHT ENFORCEMENT IN ROMANIA**

Copyright industries report continued improvements in relationships with Romanian Police, the General Public Prosecutor's Office, and the Romanian Copyright Office in 2012, but overall enforcement authorities have not prioritized combating piracy. The appointment of a specialized prosecutor and police team dedicated to IP crimes is a needed and welcome development, which is already resulting in the opening of new Internet piracy cases. At the local level, however, there has been a decrease in attention to IP crimes. 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. Law enforcement also suffers from misguided priorities in online piracy cases, taking on slow and unproductive cases against BitTorrent users rather than bringing action against the administrators of services offering unauthorized material. General political and economic stability, combined with the expiration of the mandate of the General Public Prosecutor of Romania in October 2012, have prevented decision-makers from focusing needed attention to IP enforcement.

With no new leadership yet appointed to the General Public Prosecutor's Office, the Intellectual Property Working Group that was formed in 2006 as a form of private-public partnership, has also suffered and is in need as much as ever of more engaged leadership. Some activity has taken place in the Working Group via email information exchange, but there have been no meetings in the second part of 2012. Led by the IP Department of the Public Ministry within the 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 2012, BSA reports that its relationship with the Romanian Police has substantially improved. The police have specially appointed officers for IPR matters, and most of the raids in Romania are *ex officio*. However, in 2012 the number of raids conducted by the police continued to drop significantly, and the public prosecutors have a history of dropping cases. The superiors of the General Inspectorate of Police should retain specialized officers and ensure resources are adequate for their dedication to 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 2012, BSA had about 260 new raids (185 for end-users cases, 42 for resellers/distribution and hard-disk loading cases, and 38 for Internet piracy)—altogether a dramatic decrease from the 500 raids conducted in 2009. The number of PCs searched in a given raid has also decreased, and so, as a result, have the damages assessed per case – from approximately US\$12,000 in 2009 to US\$5,000 in 2012. By the end of 2012, fifteen cases resulted in convictions (four of these were for end-user piracy, ten in resellers/distribution cases – one of which was sentenced to actual imprisonment of three years and four months, none for hard-disk loading piracy, and one Internet piracy case). This is, again, a major decrease in convictions compared to 2011 (29 convictions), 2010 (34 convictions) and 2009 (24 convictions). Law enforcement also raided some local public authorities and publicly owned entities in 2012, stepping up enforcement against government use of unauthorized software.

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.

A major obstacle in software end-user piracy enforcement is the need to have both a physical location warrant and a computer search warrant issued in order to search computers to identify unlicensed software; such

warrants may be issued only by a judge and only if the criminal investigation is officially initiated. At the same time, the criminal investigation may be initiated only if sufficient evidence exists. In practice it has proved difficult to gather such evidence necessary for having the criminal investigation initiated. This issue dates back to 2005 and is still unsolved. It has been the subject of discussion for amendments to the copyright law, as described above.

A new issue in software cases has arisen, in that some courts request a strict identification of the computers and of the digital data media that are to be searched prior to the search, which in practice is impossible. For this reason, the police are forced to split raids into two procedures: first, they get the physical location search warrant to visit the site, and second, having retrieved the computer identification information, they can request the search warrant for the PCs themselves. This process is time- and resource-consuming and it can also lead to unsuccessful raids, for example when a company is searched with only a physical location search warrant and shows some proof of license, after which the police have no way to uncover underlying software installation for unlicensed upgrades or additional programs. Senior levels of law enforcement agencies have supported the possibility that the law allow for a single search warrant, valid for both the physical location and for all computers and digital data media in that location, without requiring the identification in advance of all computers and digital media to be searched.

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 that occurred 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 IP cases, among other responsibilities. However, the requirement to hand over IP cases to specialized prosecutors is not strictly followed, and inexperienced prosecutors may be called upon to handle these highly technical cases. The problem is compounded under the 2010 reorganization of court jurisdiction of copyright cases, by which the effectiveness of IP-trained prosecutors is even further diminished. A 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 is one of the 15 Romanian Appeal courts, rather than the High Court of Cassation and Justice. All civil copyright cases 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, the past two years have 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) removed intellectual property law from the mandatory curriculum in 2011. Industry representatives recommend considering reinstating authority to the courts above, to consolidate training invested in experts at the Tribunal level.

As a practical matter, it is extremely difficult to address the shortcomings of the Prosecutor's Offices functioning in the courts of first instance (in Romanian "judecatorii"), through IPR training due simply to the significant number of prosecutors involved. At the national level, there are 42 Courts of Second Instance (in Romanian

“tribunale”) and 188 Courts of First Instance. Each is assigned its own Prosecutor’s Office, and the number of prosecutors engaged by the Prosecutor’s Offices functioning within each Court of First Instance is higher than the number of prosecutors engaged by the Prosecutor’s Offices functioning within each Court of Second Instance. This is a fact that hinders the collaboration between the antipiracy associations with prosecutors and Police with any specialization. Furthermore, Romania’s courts lack specialized IPR judges or panels, making it difficult to provide targeted training for judges. Prioritization of IP 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. 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 three 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.

In 2012, local music industry representatives filed 68 criminal complaints regarding digital piracy, and a total of 97 criminal cases went forward regarding digital piracy that are currently under investigation. The music industry in 2012 requested damages amounting to 187,297 euros (US\$253,056), of which 61% pertained to digital piracy and 39% to physical piracy) but has collected a total of only 6,510 euros (US\$8,795) in damages. At the national level, 39 cases were dropped from criminal prosecution, and 11 cases (all regarding physical piracy) were resolved by the courts, most of these ruling the conviction of the defendant with criminal fine or with suspended sentences of imprisonment.

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 recent years, there has been a positive trend in the average processing time to receive piracy expertise from ORDA officials. 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.

The software industry notes that ORDA has no criminal enforcement competence with respect to software piracy, but it does supervise the activity of professionals involved in the software business, such as importers, producers, distributors, and resellers. ORDA will apply administrative sanctions in cases where registrations, administrative measures and obligations are not observed. ORDA served as an important partner with BSA in 2012, promoting legal software use among public authorities and publicly financed entities, and emphasizing the security and other risks associated with software piracy. An ORDA-BSA cooperation protocol was signed in October 2012.

**IPR Trainings and Public Awareness:** In 2012 BSA conducted nationwide campaigns to raise awareness of software piracy risks. It conceived and developed a methodology guide together with the General Inspectorate of Police targeted to businesses, which became the subject of two training sessions for a mixed audience of police officers, prosecutors and judges organized by the U.S. Embassy, first in March-April 2012, and second in September-October 2012, each with over 100 participants. These trainings aimed at addressing cybercrime and some related issues in software IPR. (See [www.softwareculicenta.ro](http://www.softwareculicenta.ro).) The U.S. Embassy also organized an event in June 2012, giving BSA the opportunity to present the methodology guide to regional law enforcement. Finally, BSA participated in a program organized by the Romanian Copyright Office with the support of WIPO and of the General Public Prosecutor's Office, addressing the use of copyrighted content online, with participation from police, rights holders, and ISPs. BSA signed a cooperation protocol in October 2012 through which it is addressing local authorities in a campaign expected to run until mid-2013.

In July-August 2012, the Romanian Association of Music Industry conducted an antipiracy campaign in collaboration with the U.S. Embassy, with the objective to curb piracy rates in the music business and promote the legal use of music in Romania. This educational project addressed teenagers, whose music consumption habits are easier to influence through the power of positive examples. The strategy was to address the target not by presenting the legal threats they will be exposed to when choosing to illegally download music products, but by underlining the positive outcome that results from doing it "the right way." Rights holders developed two prize competitions in connection with Universal Music artists who visited Romania in the summer of 2012: Jessie J (28th of July, Mamaia) and Lady Gaga (16th of August, Bucharest). Teenagers who legally downloaded or purchased a physical product of the artist from selected web stores were invited to provide their personal information on campaigns' website ([www.getmusic.ro/rewardyouridol](http://www.getmusic.ro/rewardyouridol)) and enter a drawing for a prize to either meet their favorite artists in person or win special prizes (e.g., official artist merchandise, CDs, DVDs).

# SAUDI ARABIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Saudi Arabia be elevated back to the Watch List.<sup>1</sup>

**Executive Summary:** IIPA previously supported USTR's removal of Saudi Arabia from the Watch List, but 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 Saudi Arabia be placed on the Watch List. Such progress has not been made, and IIPA recommends that Saudi Arabia be returned to the Watch List.

Saudi Arabia has the highest piracy rates in the Gulf region, in the 90% range for movies and music, unacceptably high for entertainment software and publishing, and higher than the global average for software. High-quality counterfeits enter into the channels of commerce in Saudi Arabia from UAE (duty-free zone) and China. The government has made little progress in legalizing its software use, and street vendor piracy continues to be a major and visible problem. The adverse effects of piracy in Saudi Arabia are evidenced by the closure of tech companies like Al-Dawalej, Sakhr, Al-Alamiah Technology Group, and Al-Arees. The multiplier effects of reducing piracy would add roughly US\$4 billion to the Saudi economy for the software industry alone.

The Board of Grievances (BOG) conviction on February 29, 2012 of the owner of *Video Mesfir* (a Saudi National) for copyright piracy including imposition of a prison sentence was a positive step, but systematic and routine judgments with deterrent penalties are needed in order to dramatically reduce piracy rates in Saudi Arabia. Unfortunately this has not occurred, nor has publicizing of Ministry of Culture and Information (MOCI) enforcement efforts or taking effective enforcement actions against Internet piracy. IIPA also believes it is critical to reinstate MOCI Deputy Minister Eid Al-Hoot (which was supposed to occur in July 2012), who can ensure the swift launch of the National Awareness Campaign for IPR, the addition of needed inspectors, the issuance by the Violations Review Committee (VRC) of deterrent outcomes,<sup>2</sup> and the bringing of more cases to the BOG. 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.<sup>3</sup> 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 2013.

### PRIORITY ACTIONS REQUESTED IN 2013

#### Enforcement

- Implement MOCI directive to add 7 inspectors and complete request of the King for approval for 100 additional inspectors and to approve a reward program for them, as previously requested by industry (and IIPA).<sup>4</sup>

<sup>1</sup>For more details on Saudi Arabia's Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2013SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

<sup>2</sup>IIPA understands that two major cases involving counterfeit Windows supplied to government entities resulted in the issuance of very weak judgments of less than US\$10,000 in fines and no other deterrent penalty.

<sup>3</sup>International 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](http://www.iipa.com/pdf/2011_Oct15_IIPA_Comments_on_MENA.PDF).

<sup>4</sup>IIPA has long noted short-term goals (immediately adding 10-15 cooperating inspectors with rewards for anti-piracy activities), medium-term goals (within three months adding 10-15 full time employee inspectors on top of the cooperating inspectors, bringing the total number to 25-30), and long-term goals (within six to eighteen months, having 50 full time inspectors, with retention program and reward and incentives plan, similar to Customs plan of 50% of collected fines being used for rewards). This would not be an insignificant amount, since, for example, the five copyright inspectors in 2011 collected more than US\$800,000.



- 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.
- Ensure that cases involving major seizures or repeat offenders are systematically adjudicated through the VRC and the BOG, resulting in deterrent sentencing. Conduct MOCI-directed workshop between VRC and BOG to speed up process and agree on a framework for execution of deterrent cases.
- Widely publicize all enforcement 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 a prosecutorial position within the VRC.
- Reactivate the Police Committee in Riyadh and duplicate committees 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.
- Establish special cyber crime unit within the Police Committees and an Internet piracy unit at MOCI, and MOCI should work closely with the Communication and Information Technology Commission (CITC) to take actions against Internet piracy. CITC is currently blocking websites for pornographic content but not for copyright violations. CITC should act on its own to identify websites and coordinate with MOCI to block such websites.
- Enforcement of marketing conditions should occur, meaning raids and takedown actions against pirate products which are both freely available on the streets and advertised online.
- MOCI, the police, and rights holders should cooperate to develop a plan to convert 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.
- 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, unlicensed software use 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.

### Legislation

- Amend Copyright Act to fully implement (and join) the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT), including ensuring that the law provides incentives for Internet Service Providers (ISPs) to cooperate with rights holders against online piracy.

## **PIRACY UPDATES IN SAUDI ARABIA**

**Enterprise End-User Software Piracy and Government Legalization of Software:** The software piracy rate in Saudi Arabia was 51% in 2011, above the global average of 42%, and representing a commercial value of unlicensed software of \$449 million.<sup>5</sup> Enterprise end-user piracy of software and insufficient government legalization continue to be major contributors to the software piracy problem in Saudi Arabia. Reductions in 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

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<sup>5</sup>BSA | The Software Alliance's 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Saudi Arabia was 51%, representing a commercial value of unlicensed software of US\$449 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA's 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

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.<sup>6</sup>

**Hard Disk Loading and Street Vendor Sales Also Harming Industries:** The software industry also notes that hard disk loading by resellers and street vendor sales are harming the industry's capacity to sell legitimate product in Saudi Arabia. Major street piracy continues in the main three regions being Eastern (Dammam, Khobar, and Dhahran), Central (mostly Riyadh) and Western (Jeddah, Makkah, and Madinah). The continued prevalence and indeed growth of street vendor piracy sends the message that addressing the issue is not high on the country's agenda.

**Internet Piracy Proliferating:** With legitimate digital services launching in Saudi Arabia (along with phone offerings such as the iPhone5), it is incumbent upon the Saudi government to ensure an adequate legal and enforcement framework exists to deal with inevitable digital or online piracy.<sup>7</sup> By 2012, there were a reported 13 million Internet users in Saudi Arabia (representing 49% of the population),<sup>8</sup> and 1.6 million fixed broadband subscriptions.<sup>9</sup> As a result, online piracy has grown to become a serious problem in Saudi Arabia in recent years.

**Pay-TV Piracy (Especially on the Compounds):** Piracy of content on premium services like Orbit, Showtime, and Abu Dhabi Media Company in the compounds continues to be a very serious problem in Saudi Arabia. Each compound has thousands of homes under central management controlling and operating cable services. The compounds utilize smart cards, installing them in their centralized "head end" and then redistributing pay-TV channels without the authorization of the content owners or distributors to thousands of homes. The management of these compounds are very influential and can clearly afford to pay for premium channels but choose not to do so.

## **ENFORCEMENT UPDATES IN SAUDI ARABIA**

**Deterrent Enforcement and Penalties Lacking Across the Board:** A significant hurdle to dealing with the piracy problem in Saudi Arabia continues to be the lack of overall and sustained deterrence. IIPA acknowledges the important BOG conviction against the owner of *Video Mesfir* for copyright piracy. This case, along with sustained enforcement results in 2010 and some VRC administrative cases resulting in maximum fines, gave hope that a level of deterrence would be achieved.<sup>10</sup> Unfortunately, these results were not sustained in subsequent years. The software industry reports that through 2012, there were only 130 cases, all resulting in non-deterrent fines. The lack of an adequate number of MOCI inspectors in the copyright departments (reportedly there are only three in Riyadh at this time and two in Jeddah) is a principle cause for a lack of significant raiding activity in Saudi Arabia. IIPA has recommended above a systematic plan to increase human resources in terms of MOCI inspectors, and also recommends the systematic involvement of the Ministry of Interior to spearhead investigations, raids and

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<sup>6</sup>Business 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\\_saudi-arabia\\_english.pdf](http://portal.bsa.org/piracyimpact2010/cps/cp_saudi-arabia_english.pdf).

<sup>7</sup>Noelle Manalastas, *Apple Opens iTunes Store in Middle East, Unveils iPhone 5 Release Date*, Al Arabiya News, December 5, 2012, at <http://english.alarabiya.net/articles/2012/12/06/253621.html>.

<sup>8</sup>European Travel Commission, NewMedia TrendWatch, *Saudi Arabia*, December 19, 2012, at <http://www.newmediatrendwatch.com/markets-by-country/11-long-haul/58-saudi-arabia>.

<sup>9</sup>International Telecommunication Union, *Fixed Broadband Subscriptions 2000-2011*, at <http://www.itu.int/ITU-D/ict/statistics/material/excel/Fixed%20broadband%202000-2011.xls>, accessed on January 10, 2013.

<sup>10</sup>In 2010, under H.E. Al-Hazzaa'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 submission 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 holders, more than 400,000 items seized, and 1,320 "closure days" for infringing shops. Kingdom 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). 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). The VRC had also started awarding civil damages in its administrative cases and in 2008 had done so in 19 cases involving software piracy. The average of the fines and damages was around US\$3,000, which remains too low. The total of all fines and damages in 19 cases were SR148,000 or US\$39,466.

prosecutions against source piracy. Moreover, the Ministry should appoint a prosecutor to take charge of cases before the VRC as recommended.

**Enforcement Against End-User Piracy and Reseller Piracy:** Effectively reducing end-user piracy of software will require an increase in human resources and removal of other hurdles to effective and deterrent enforcement. The low number of MOCI inspectors (reported to be five overall) allowed at most 40 to 50 visits to end-users in 2012, for example. If the current trend were followed, given the more than 700,000 registered companies in Saudi Arabia, it would take more than 2,000 years to visit all the companies. The visits conducted are also not that effective, as the technical knowledge of the existing inspectors is limited. This creates issues in identifying the existing infringements and results in some of the visits detecting no infringements (this is particularly problematic in Eastern Saudi Arabia, such as Dammam, Khobar, and Dhahran). In Western Saudi Arabia (Jeddah, Makkah, and Madinah), enforcement efforts remain weak, with only four to five inspections in all of 2012. Where raids are effective and result in fines, the fines are so low that they do not even amount to the cost of doing business. Finally, MOCI faces hurdles in end-user raids involving end-users refusing access to run the raid; as a result, Police should accompany the MOCI inspectors. Otherwise, delays are incurred while MOCI awaits approval from the government which usually takes a month (or more).

In 2012, MOCI's Director of Copyright reportedly revealed new measures to target companies and individuals who continue to be involved in the trade and use of pirated software; it is yet to be seen whether these measures will have a sustained effect,<sup>11</sup> but industry reports that only 50 or so reseller raids were conducted in 2012. There is very little enforcement against street piracy in Riyadh (in fact, only one action in 2012 reported with seizure of 17 cars used for infringement), and virtually no enforcement in Eastern or Western Saudi Arabia.

**Little Progress on Government Legalization:** At the 2009 IPR Working Group meeting between the U.S. government and the Saudi Arabian government, commitments were made by MOCI to upgrade and legalize the government's software use. MOCI was to have also undertaken an inventory, but no results have been provided to industry. The prospect of imminent progress on this front was a key element of IIPA's recommendation several years ago to remove Saudi Arabia from the Watch List. In addition, industry has reported sharp increases 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 three years 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.

**Customs Choke Point Needed to Halt UAE and China Imports:** Unfortunately, much of the physical hard goods piracy in Saudi Arabia is coming in from UAE duty-free zones and China. Customs has not been active, however, and should now be directed to strictly enforce against piratical imports, including taking *ex officio* actions.

**Enforcement Against Internet Piracy Lacking:** With growing Internet piracy, it is time for the Saudi Arabia government to become more active in effectively enforcing the Copyright Law against infringing websites and links. IIPA understands that VRC has obtained more than 50 judgments under the leadership of MOCI Deputy Minister Ahmed Al-Hoot to disable infringing websites. Also, we understand MOCI has sent a letter to CITC requesting that CITC send a directive to all ISPs to deal effectively with online infringements. CITC, which regulates ISPs and the telecom industry in general, has taken actions to disable access to foreign websites, but has done so on the grounds that they violate Saudi censorship laws. Meanwhile, efforts have been ongoing to convince MOCI to set up an

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<sup>11</sup> Rodolfo Estimo Jr., *New Law Enacted to Stamp Out Piracy in Saudi Arabia*, June 5, 2012, at <http://arabnews.com/new-law-enacted-stamp-out-piracy-saudi-arabia>.

Internet piracy unit within the Copyright Department rather than have this enforcement undertaken strictly through CITC. It is imperative for both CITC and MOCI to develop comprehensive regulations on addressing copyright violations committed over the Internet. A cybercrime unit should also be set up within the police, as requested in recent years' submissions. Any solution must include both hosted as well as remotely accessible content and address infringements over peer-to-peer (P2P) networks.

**Enforcement Against Pay-TV Signal Theft in the Compounds:** Enforcement against pay-TV piracy is complicated because it is very difficult for the police to enter 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 often 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-Hazzaa. 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 nonexistent. Far heavier penalties, including referring these cases to the BOG, is critically needed.

**Enforcement Against Book Piracy and Music Piracy:** Publishers have within the last two years commenced an aggressive enforcement program. They have received good cooperation from MOCI and regular raids were being run upon request as of a couple years ago. Raiding needs to be extended to all sectors, including the music and recording industry which suffers very high rates of piracy in the Saudi market, both physical and online. 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.

**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, the commitment to complete population of cases on the website (and to have them translated into English) by late 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. MOCI has yet to put into place mechanisms enabling effective exchange of information and cooperation between Saudi enforcement authorities and foreign right holders whose anti-piracy operations, especially in the Internet sphere, are frequently run from outside Saudi Arabia. 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.

## **COPYRIGHT LAW AND RELATED ISSUES**

**Remaining Deficiencies in Saudi Law Related to Deterrence:** Virtually all the deficiencies in the Saudi Copyright Law previously identified by IIPA were remedied in the Copyright Law implementing regulations adopted in 2005. Two deficiencies appear to remain, however. The law appears not to mandate destruction of infringing goods and does not require the award of costs and attorney's fees as required by TRIPS. Furthermore, statutory prison sentences remain very low. It remains very important to ensure that the penalties structure for the VRC and BOG remain high enough to deter piracy, and we would request a review to ensure that penalties are indeed high enough to deter.

**Amendments to Adopt (and Join) WCT and WPPT:** IIPA has continually impressed upon Saudi officials the importance of developing the legal infrastructure to deal with Internet infringements by fully implementing, and

then joining, the WCT and WPPT. Nearly seven years have passed since Saudi government representatives indicated to their U.S. government counterparts that they had commenced a review of the WCT and WPPT issues and that the next step was to seek WIPO's advice on how best to proceed with implementing legislation. IIPA understood that in 2010, questions were being prepared for WIPO. It is clear that key to implementation will be protecting technological protection measures (TPMs) against unlawful circumvention, and ensuring 1) coverage of TPMs that control access to, as well as the exercise of exclusive rights in, works, sound recordings, and other subject matter; 2) cover trafficking in circumvention devices and technologies, as well as services to provide circumvention of TPMs; 3) ensure exceptions are narrow enough to preserve the adequacy and effectiveness of protection; and 4) ensure remedies against violations involving TPMs provide effective deterrence. In addition, the government must ensure that adequate rights are afforded as to communications to the public, including the interactive making available of works, sound recordings, and other subject matter. It is past time for the government of Saudi Arabia to act to provide an adequate legal framework for protection of copyright on the Internet.

## **TRAINING AND PUBLIC AWARENESS**

IIPA members and member companies have provided some training in 2012 to enhance the protection of copyright. For example, BSA has worked with MOCI to train MOCI inspectors in how to investigate and address software piracy. One BSA member has supported training three to five Saudi nationals yearly in its "Academy Program," a full year program which includes software expertise and also teaches about the importance of IP rights. This member also supported a training program for Saudis called ITQAN where 100 Saudi nationals were trained for an average of three months to better ready them to work in the area of software development, resulting in immediate employment for 80% of them. BSA members are working with the Ministry of Labor to increase this program to train thousands of future software industry employees.

# SPAIN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Spain be placed back on the Special 301 Watch List in 2013.<sup>1</sup>

**Executive Summary:** Contrary to the expectations surrounding the implementation of ley Sinde that led to Spain's removal from the Special 301 Watch List last year, Spain saw no positive developments in 2012. The landmark adoption of regulations to implement the Law on the Sustainable Economy (LES) in late 2011, through Royal Decree 1889/2011, introduced much needed procedures to facilitate the removal of infringing content from hosted websites and actions against linking sites and similar sites, which are at the center of a digital market mired in record levels of piracy. But, to the great disappointment of IIPA's members, the IP Commission established under the LES procedures has been extremely slow in response to rights holders' complaints. To date, only two websites have closed in response to complaints submitted to the IP Commission by IIPA's member affiliates, and those websites closed voluntarily. As of yet the IP Commission has not once made use of its authority to request a judicial writ from the Administrative Court to order the closure of a single infringing website or service. Meanwhile, IIPA is aware of at least 80 complaints that remain outstanding. Whatever deterrent effect against online infringement the initial introduction of the measures had has now been halted by government inaction, as the LES procedures in practice have proven to be ineffectual. More than ever, websites providing or linking to illegal content can be secure in the knowledge that takedown measures are nonexistent and result in no consequences.

IIPA urges the Government of Spain to take a broad look at its intellectual property enforcement regime in 2013, and develop a national campaign incorporating (1) improved resources for the IP Commission to allow complaints to move forward toward speedy resolution, making full use of its enforcement powers under the new legislation, (2) clarifying instructions to prosecutors (and, if necessary, legal reforms) to permit civil and criminal efforts against Internet piracy and corporate end-user software piracy to resume, (3) an effective public awareness campaign on the importance of intellectual property rights, (4) cooperation among agencies and with regional governments on anti-piracy strategies and actions, (5) training for prosecutors and criminal and civil judges to increase their knowledge of intellectual property rights and the impact of piracy, and (6) focused attention on well-known markets for widespread street piracy, with increased *ex officio* actions against labs and street sales and follow-through by prosecutors and courts.

### **PRIORITY RECOMMENDED ACTIONS FOR SPAIN IN 2013**

- Correct the Attorney General's May 2006 Circular that effectively decriminalizes infringing downloads over peer-to-peer (P2P) networks, and that continues to prevent authorities from pursuing cases against Internet piracy and against the illegal copying of software on user computer systems.
- 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 v. Telefonica*.
- Provide adequate resources and improve the functioning of the Spanish IP Commission to use and enforce all of the provisions of the Law on the Sustainable Economy that address web-hosting of pirated content, and,

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<sup>1</sup>For more details on Spain's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2013SPEC301HISTORICALCHART.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2013 global issues, see our cover letter at <http://www.iipa.com/pdf/2013SPEC301COVERLETTER.pdf>.



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 effective means of providing Internet service providers (ISPs) knowledge that infringement is occurring on their services without court orders.
- Amend the incorrect implementation of the right of information contained in article 8 of the Enforcement Directive in the Civil Procedure Law (Ley de Enjuiciamiento Civil) so the "commercial scale" requirement is only applicable to intermediaries, not also to their clients as set out under the current Spanish Law.
- Amend the Intellectual Property Law in order to clarify that linking sites are infringing and can be prosecuted.
- Incentivize ISPs to cooperate in efforts to stem infringing file sharing activities.
- Take appropriate legislative steps to ensure that the commercial dealing in circumvention devices is a criminal offense.
- 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.
- Establish clearly defined lines of communication between rights holders and authorities in the National Tax Agency devoted to tax fraud and smuggling linked to IP infringement, and work with electronic payment services such as VISA, MasterCard, and PayPal to block payments to distributors of pirate product.
- Seek agreements between rights holders and major online advertising services such as AUTOCONTROL and IAB Spain, along the lines of the efforts in 2012 by the Coalition of Creators and Content Industries (*Coalición de Creadores e Industrias de Contenido*) toward the removal of advertising from websites offering illegal material.

## **COPYRIGHT PIRACY IN SPAIN**

For the Internet-connected Spanish population,<sup>2</sup> there is very little to deter the average consumer from participating in an online free-for-all for unauthorized copyrighted content. 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, enterprise end-user piracy of 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, all forms of Internet piracy.

After years of difficulty in and decimation of the Spanish market, many in the copyright industries see not a hint of optimism for the levels of piracy in the country—and this is so despite the implementation of LES. For both consumers and businesses, the available variety of delivery and content of pirated material over the Internet is continuously expanding. For music, online streaming is growing and is becoming an important form of piracy in Spain. An increasing number of businesses, such as discothèques and night clubs, have become comfortable using

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<sup>2</sup>Spanish consumers are remarkably Internet-savvy. As of June 2012, 31.6 million Internet users comprise 67.2% of Spain's population, an increase of 5% in just the past year (according to [www.internetworldstats.com](http://www.internetworldstats.com)).

music from illegal sources or without proper public performance licenses. For the film industry, Internet traffic associated with pirated material has increased over the past year, with a notable migration from cyberlocker activity (following the international closure of Megaupload) to peer-to-peer (P2P) networks, and in particular BitTorrent P2P protocols. The business software sector in Spain faces increasing organizational end-user software piracy.

**Online Piracy Generally:** Internet piracy in Spain began to skyrocket in 2007, and it has continued to grow at a tremendous rate. Today, Internet piracy in Spain occurs via hosted websites, linking sites that direct users to infringing content stored in “cyberlockers” and increasingly via BitTorrent networks, more “traditional” P2P networks (such as Edonkey), 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 among the worst Internet piracy problems in the the EU, and continues to suffer considerable damage to the distribution infrastructure for legitimate content.

**Online Piracy of Motion Pictures:** According to the Anti Piracy Federation (FAP), whose members include film and videogame groups in Spain, the rate of piracy for the film industry in Spain reached 73.9% in the first half of 2011, and the value of pirated content grew to 1.4 billion euros. Of the digital piracy in Spain, 55% occurs via P2P networks, 34% via hosted websites, and 11% by streaming sites. FAP is aware of nearly 400 websites offering to Spanish consumers unauthorized access to movies and videogames. For the independent motion picture industry, Spain ranks consistently among the worst countries in which unfettered 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. For the film industry generally, unfettered digital piracy of motion pictures in Spain has a ripple effect across Latin America, where Spanish-language films proliferate, originating from Spanish pirates.

**Online Music Piracy:** In general terms, Spain remains one of the worst performing music markets in Western Europe, and the situation for online music piracy in the country is extremely serious. More than 90% of the music downloaded by Spanish users today is unauthorized. According to Musicmetric’s September 2012 report, the Digital Music Index, Spain ranks seventh in the world for number of illegal music downloads using P2P protocols such as BitTorrent (at over 10.3 billion downloads).

Spain’s legitimate music market is approximately one-fourth of its 2001 size,<sup>3</sup> with a modest improvement in digital sales in 2012,<sup>4</sup> and consumption through digital platforms now accounts for one-third of total revenues. Among the many legal online services available in Spain are Apple’s iTunes, Deezer, Google Play, Amazon MP3, and 7digital. It is interesting and sad to note that two of the main Spanish streaming services have either closed (Rockola.fm), or have been sold through creditor procedures (yes.fm).

In Spain, illegal music offerings on the Internet are available in many formats. According to recent data compiled by SOLUS, 52% of Spain’s online music piracy problem is via P2P file exchange protocols (with BitTorrent as the clear favorite accounting for two-thirds of Spain’s P2P traffic). The remainder of digital music piracy is split among cyberlocker users (at 55% of non-P2P activity); hosted web pages (31% and streamed music including music ripped from streaming sources (at 14%). The growth of illegal music streaming over a short lapse of time is cause for concern, and is boosted by facilitating apps for smartphones and tablets – an especially important market in Spain, which leads Germany, the United Kingdom, and France with a smartphone penetration of 55.2%.

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<sup>3</sup>The value of physical recorded music sales in Spain has decreased from €626 million (US\$826 million) in 2001 to just €93 million (US\$123 million) in 2012, which means an 85% decrease in value. Total recorded music sales (including physical and digital sales) are now €141 million euros (US\$186 million). In unit terms, sales were 73 million in 2001 and only 12 million in 2012, a drop of 83%. Because of these falling sales, more than 50% of the employees of the music sector have lost their jobs in the last few years.

<sup>4</sup>The Spanish music market declined by 5% in 2012 after its spectacular 21% collapse in 2010 and its 11% decrease in 2011. According to details from the producers’ collecting agency AGEDI, as of early 2012, more than 50% of jobs have been lost during the last four to five years in Spanish recording companies.

The legitimate hard goods and online marketplaces are unsurprisingly stunted as a result. 2012 sales of music CDs and DVDs in Spain reached their lowest point in 25 years, falling 7.89% from 2011. This marks the eleventh consecutive year drop. Overall, consumption of both physical and digital recorded music in Spain amounted to 141 million euros during 2012, a 5% decline compared to 2011 (149 million).

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 2012. For the videogame industry, online piracy via illegal downloads has completely overtaken hard goods piracy in Spain. There are dozens of major websites targeting Spanish consumers which offer links to unauthorized downloads of videogames. These links mostly allow users to directly download unauthorized copies of ESA member content that is hosted on cyberlockers or to access such files via P2P networks. ESA reports that in 2012, Spain placed fourth 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.<sup>5</sup> 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 contribute to this growth, as unauthorized copies of video game software downloaded from the Internet can only be played on consoles modified by such devices, technologies or services.

**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 nearly 75% of all U.S. films annually, with most of those films financed, produced and internationally distributed outside of the six major Hollywood studios. Independent producers partner with national distributors worldwide to finance production and secure distribution on a territory-by-territory basis. Piracy has severely damaged the ability of independent producers to raise production funding in order to support new projects.

The health of Spanish distributors and the emergence of new online distributors to license content 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 financing and distribution of independent films. When legitimate Spanish distributors and businesses must compete with “free” illegal copies (digital or hard goods), they can no longer afford to partner with producers to provide 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 reportedly may only be able to guarantee a mere two to three percent of a 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 on unlicensed platforms that are unfairly competing with licensed services. 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.

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<sup>5</sup>ESA's reporting on P2P activity does not take into account downloads of these titles that occur directly from hosted content, such as games found on “cyberlockers” or “one-click” hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

**Street piracy:** Street piracy continues in Spain and, while it has diminished for some copyright sectors, overall remains wide spread and 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 selling mostly film DVDs.

**Street piracy of music and sound recordings:** While digital piracy today has a bigger impact on music sales, street piracy continues to harm the local industry – 66% of music sales in the country still come from physical formats. Physical piracy of music and sound recordings in the streets and flea markets of Spain persists, especially in certain regions where organized networks operate with impunity, for example, in tourist areas where police surveillance is more difficult, local authorities are lenient, or there is a deeply rooted culture of flea market selling. Whereas physical music piracy is at about 20% in all of Spain, cities such as Granada, Murcia and Alicante greatly exceed 30%, and in the case of Sevilla, levels rocket to 55%. These areas serve not only as the centers of extremely high levels of street piracy, but have also displaced Madrid and Barcelona as the main operational centers for the structured pirate networks that produce pirate CDs and DVDs for the rest of Spain. Sevilla alone is the home of more than 20 flea markets across the city, representing almost 2,000 points of sale from which more than 300 are devoted to pirate sales of copyrighted content (music, films, software, games, etc.). Police sources estimate that some six million pirate CDs and DVDs are sold in Sevilla's flea markets yearly. Sold at a price of 1€ per unit or 4€ per six units, much lower than at other flea markets across Spain, pirate optical disks are sold at such volume as to bring in a healthy profit, with little to no risk of enforcement.

The City Council of Seville authorizes licenses to its local flea markets and charges consumption taxes for their activities, but otherwise exerts no control at all over their operations. Instead, the City Council has expressly delegated, sometimes through signed agreements and in most cases tacitly, the management and control over the markets to the Association of Street Selling (Asociación del Comercio Ambulante – ACA). The ACA administers the issuance of points of sale licenses and the collection of payment, putting all of the receipts toward control measures and private security and surveillance in the premises where markets are established, and also authorizes the placement of blankets and stalls to sell pirate and counterfeit CDs and DVDs at various flea markets. There is reason to believe the ACA has connections with Sevilla's organized networks involved in pirate CD and DVD duplication and distribution throughout Spain. Two judicial proceedings in Sevilla courts are investigating the possible irregularities in the management and control of the city flea markets. For unknown reasons, Sevilla local police have instructions not to patrol or act inside the grounds of flea markets, and the local police unit specializing in investigating and monitoring piracy in the city was dismantled in October of 2012.

**Unauthorized public performances of music and sound recordings:** The music industry in Spain continues to see an 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.

**Hard goods piracy of entertainment software:** In general, hard goods piracy of videogames has declined as Spanish consumers increasingly turn to the Internet to download pirated games. Nevertheless, sales of circumvention devices, such as mod chips and game copiers, continue unabated by online vendors and e-commerce sites. The widespread availability of mod chips and game copiers that bypass technological protection measures (TPMs) are central to the overall piracy problem for the local and international video game industry, as these devices are needed to play unauthorized copies of video game software. 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:** Local film industry representatives report that although there is a slight reduction in hard goods piracy of audiovisual material compared to previous years, the level of piracy remains unacceptably high. Street vendors are visible in Madrid, Sevilla, Alicante, Valencia, and especially in the north of Spain, in Oviedo, Gijón, and Vigo. There are an estimated 3,000 street vendors across Spain. The

legitimate home video market for Blu-ray and DVD was barely 15 million DVDs and Blu-ray discs sold in 2011, while pirate street vendors are estimated to have sold 20 million pirate DVD-Rs. Home video shops numbered 9,000 in 2005, but now count less than 2,000. Video distributors are abandoning the market – since 2006, membership of the major trade association for video distributors decreased from thirteen members to five. Large companies, like Universal Home Entertainment, have also left Spain in late 2010 reportedly due to piracy. Overall, the home video market shrank by 35% during 2011, and another 11% during the first half of 2012.

**Camcord piracy:** Camcording is particularly damaging in Spain because it fuels rampant online piracy, negatively impacting worldwide distribution and preventing the establishment of legitimate online distribution services. Spanish-sourced copies routinely appear in other markets, particularly in Latin America. Even illegally exchanged P2P movies are sourced locally via camcording in Spanish theaters. Despite the clear commercial damage of such camcording and the clear evidence of the organized criminal nature of such piracy, prosecution of camcorders remains quite difficult. While not an anti-piracy tool, the independent film industry reports that independent producers are less likely to have the resources or ability to coordinate “day and date” releases amongst their national distributors, leaving them and their authorized distributors especially vulnerable to piracy stemming from illegal camcords. The public prosecutors are generally not inclined to prosecute criminal cases.

**Software piracy:** BSA | The Software Alliance (BSA) reports that the software piracy rate in Spain stood at 44% in 2011 (an increase from 43% in 2010), representing a commercial value of unlicensed software of \$1.2 billion.<sup>6</sup> This includes a significant level of unlicensed software use by business end-users, particularly small- to medium-sized enterprises (SMEs). 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. Internet piracy also continues to present significant challenges to the software market.

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 ten 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 US\$2.923 billion.<sup>7</sup>

## **COPYRIGHT ENFORCEMENT ACTIONS IN SPAIN**

The expectations surrounding the decisive action of the Government of Spain in December 2011 to implement the Law on the Sustainable Economy (LES) have, regrettably, been sorely undermined.

Industry groups continue to report good cooperation with certain enforcement authorities in Spain, but judicial attention to IP cases is extremely slow or nonexistent. Seven years ago, the Attorney General issued instructions effectively decriminalizing organized online file sharing of pirated content, and instructing prosecutors that end-user piracy of business software must meet several unrealistic criteria to be considered to have a “commercial purpose” subject to criminal liability. Unfortunately, to this day Spain’s public prosecutors in general still do not follow through with cases against defendants in any copyright actions brought by the police involving online piracy, and appellate courts are dismissive of similar claims. Prosecutors also do not bring actions for corporate

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<sup>6</sup>BSA | The Software Alliance’s 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Spain was 44%, representing a commercial value of unlicensed software of US\$1.2 billion. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

<sup>7</sup>See The Economic Benefits of Reducing PC Software Piracy, available online at <http://portal.bsa.org/piracyimpact2010/index.html>.

criminal liability arising from software infringement, available under amendments made to the Criminal Code in 2010. Court procedures suffer from lengthy delays, lasting on average 18 months, and appeals are unlikely to result in deterrent sentences. 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.

**Administrative Internet Enforcement under The Sustainable Economy Law (LES):** On December 30, 2011, the Spanish Government adopted much-anticipated implementing regulations for the LES establishing Section 2 of the IP Commission, the Spanish Copyright Commission (herein, the IP Commission) for the administration of notices and removal orders regarding infringing hosted online content. In the time since the IP Commission has been established, it has produced remarkably few results in the fight against online piracy. It is more urgent than ever that the Spanish Government provide a strong message of its intent to combat piracy by following through with implementation of the LES with more speedy and effective responses to complaints, holding responsible not only locker and host sites, but also linking sites, and by encouraging the Spanish consumer to embrace the benefits of accessing licensed content through authorized online distributors.

From the establishment of the IP Commission on March 1, 2012 to the time of reporting (December 31, 2012), collecting societies and associations in Spain associated with IIPA members have filed a total of 87 complaints to the IP Commission, only 16 of which have been initiated into cases under the IP Commission and none of which have resulted in a blocked website. The simple initiation of a case has proven to be an agonizingly slow process: all 16 of the initiated cases were initiated more than 30 days after their filing, 44% of them more than 90 days after their filing, and in two proceedings the delay exceeded 240 days. The most egregious and urgent of the complaints pertain to repeat infringement, but to date only one such complaint has been processed. Altogether, the IP Commission has fully resolved only seven of the complaints brought by IIPA affiliates, some by expiration of the proceeding and others through the voluntary action of the subject website.

The opportunity for the LES procedures to lead to speedy takedowns of infringing links from the very problematic linking and indexing sites that target Spanish consumers was an important goal for rights holders, and something the Government of Spain assured that these procedures would address. To that end, the LES provides that for each complaint filed, the IP Commission is to issue notifications to both the responsible party (the infringer) and the intermediary. The responsible party is required to remove the infringing content within 48 hours, but the procedure also fixes the intermediary with effective knowledge of the infringement, including future links to the same file, and is required to take down the infringing link or material if the responsible party has not done so. Unfortunately, the IP Commission has treated linking sites that have been the subject of complaints as intermediaries (with the exception of those who also act as streaming sites and host their content or those sites that embed videos from sites like YouTube, naming as the responsible parties the cyberlockers such as Uploaded.to and Letibit.net that hold the infringing source files. The effect of this misnomer is that linking sites (in practice the more dynamic and harmful actor in these circumstances) are not held accountable for immediate takedowns as responsible parties. Meanwhile, the cyberlockers deemed to be responsible parties are frequently, if not always, located in foreign jurisdictions.

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 may ask a tribunal—the Central Administrative Court—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 by incorporating this important due process check directly into the review. To the knowledge of IIPA, not a single complaint has been referred to the Central Contentious Administrative Court for

issuance of a judicial order. As far as IIPA members are aware, the IP Commission also has not, as is required of it under article 13.4 of the implementing decree, proceeded to file complaints before any relevant authority in the cases in which known facts indicate criminal intellectual property infringement under article 262 of Criminal Procedure Code. It is unclear why the IP Commission has allowed so many complaints to languish. Its workload is all the more backlogged due to the fact that rights holders are not permitted to claim infringements for the entire repertory of material on a given website, but rather must limit complaints to approximately 15 albums or works per complaint.

It was hoped that with time and experience, this process would become routine and efficient. This has sadly not come to pass, and the comprehensive elements of the law and its implementing regulations to ensure judicial review and due process have as yet gone untested, while complaints with the IP Commission continue to accumulate in a backlog. Moving the existing complaints through the due process steps provided for and removing other unnecessary procedural hurdles will not only demonstrate the fairness of the system for this narrow category of online infringement, but will also allow Spain to move toward meeting its key obligations under the World Intellectual Property Organization (WIPO) Internet treaties to “ensure that enforcement procedures are available ... so as to permit effective action against any act of infringement of rights ..., including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements” (Article 23 of the WIPO Performances and Photograms Treaty (WPPT), and Article 14 of the WIPO Copyright Treaty (WCT)). At present, the IP Commission has taken no deterrent action whatsoever – the system currently serves to simply present a voluntary removal option to hosts of infringing content.

**Criminal actions and prosecutions involving Internet enforcement:** Criminal actions in Spain face very slow court actions and ultimately a lack of deterrent sentencing. The national, regional, and local forces in Spain continue to be proactive in seeking training and in taking *ex officio* actions against both physical and digital piracy, but much of the value in these actions is lost when cases are turned over for prosecution due to a variety of factors, including capacity and gaps in the law. Legal shortcomings in Internet piracy cases are attributable in large part to the standing instructions regarding Internet piracy that the Attorney General issued in 2006, described in greater detail under Copyright and Related Laws in Spain, below. Due to the 2006 Circular and various court decisions, the police, prosecutors, and the National Police, Technology and Internet Division (BIT) have all significantly reduced work on Internet piracy cases.

Rights holders have been active in sending cease and desist letters, resulting in 18 site closures. As far back as 2009, 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 State Secretariat for Telecommunications and Information Society (SETSI) with the details for 200 websites offering links to illegal downloads of copyright works, of which only 41 have yet been subject to administrative procedures to date, with very poor results: more than half were dropped, as the Ministry found no grounds for administrative infringement. Only 17 cases have been initiated to date, but so far none have been subject to sanction.

**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 2012, having led to a halt in criminal enforcement actions against illegal file sharing. Circular 1/2006 from Spain’s Office of the Prosecutor-General (Attorney General) argues that unauthorized uploading of copyright protected materials over the Internet, including via P2P systems, is not subject to criminal action under Article 270 of the Criminal Code unless such acts are “for commercial profit”, and that unauthorized downloading must be considered an act of private copying.

Article 270 of the Criminal Code requires that to be considered a criminal infringement, infringing activities have an aim of profit, but it does not specify how to interpret the element of profit in intellectual property crimes. Intellectual property rights are protected against unauthorized reproduction, distribution and public communication, that is to say, acts from which they obtain economic benefits. For that reason, infringement against intellectual property rights are addressed in Title XIII of the Criminal Code, “Crimes against the patrimony and the socio

economic order.” The interpretation of the aim of profit for crimes against intellectual property rights, then, should be the same that the Supreme Court uses for other crimes against the patrimony, that is to say: “any advantage, utility, benefit or return that the subject may intent to obtain, without taking into account the way of producing his aim of profit or whether he obtained it or not.” Instead, the Circular considers that for Intellectual Property crimes, the aim of profit required should be commercial profit, excluding the activities carried out by P2P networks. On page 43, the Circular explains: “The activity of uploading phonograms can be pursued in the civil Courts, but it will not be considered a crime unless he (the uploader) obtains remuneration.”

The Spanish Government has stated that the Circular is “not binding” on any judge. The Ministry of Industry, Tourism and Trade recently confirmed that actions against P2P file sharing cannot be brought in the Criminal Courts, although it stated that “those who commercially benefit for example, from the direct sale of protected content, or from the profits generated by the advertising on the website that links or serves as search engine for downloads, do meet the criminal nature of article 270 and subsequent of the Criminal Code.” Unfortunately, this statement does not reflect the reality of criminal actions in Spain.

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. Spain’s Courts of Appeal (Audiencias Provinciales) have held that advertising revenues for the websites that allow copyright infringement do not meet the profit criterion set by the Circular, thereby rejecting causes of action in the cases of Indicedonkey (10 March 2011), Rojadirecta (27 April 2010) and CVCDGO.com (11 May 2010). Throughout 2011 into 2012, criminal Investigation Courts also continued to dismiss criminal actions against websites linking to unauthorized copies of copyright works (see, e.g., the case of [www.estrenosdivx.com](http://www.estrenosdivx.com), Criminal Investigation Court Ferrol, nº 3, January 24th 2011), and the thinking behind the Circular has also gained traction at the appellate level (see, e.g., the case of [www.indicedonkey.com](http://www.indicedonkey.com), Madrid Appeal Court March 8th 2011; and the streaming case of [www.cinetube.es](http://www.cinetube.es), Álava Appeal Court February 3rd 2012). The latest Court decisions do not expressly mention the Attorney General’s May 2006 Circular, but do reference previous rulings that cited the Circular in finding no criminal grounds to proceed against websites that made direct or indirect gains through advertising income. New rulings from the criminal courts are resulting in dismissals that are affirmed on appeal.<sup>8</sup>

The Attorney General has refused industry requests to amend the Circular, which remains in effect seven 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 are reducing focus on Internet piracy. On the whole, effective police action is not feasible today.

Enforcement against operators of pirate sites is further undermined by a split among Spanish courts regarding whether linking to infringing content constitutes an infringement of the communication to the public right. Some Spanish courts have declared that merely linking to infringing files is not a criminal offense under the Spanish Criminal Code.<sup>9</sup> The Spanish association for entertainment software distributors (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. Rights holders have suggested an important amendment of the Criminal Code that would clarify that websites acting as active intermediaries (such as

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<sup>8</sup>See Decision of Audiencia Provincial (Court of Appeal) of Alava, Section 2, February 3, 2012; and Decision of Juzgado de Instrucción No 3 of León, October 30, 2012 (regarding [zonademuxica.com](http://zonademuxica.com), [todoslosexitos.com](http://todoslosexitos.com)).

<sup>9</sup>In 2011 there were several final (unappealable) decisions: [Indicedonkey](http://Indicedonkey) (Madrid), [Edonkeymania](http://Edonkeymania) (Madrid) and [Zackyfiles](http://Zackyfiles) (Zaragoza).

linking sites) to massive IP infringement are subject to criminal penalties, with the hope that prosecutions can once again move forward against services in P2P piracy cases, but it is uncertain whether it will be finally introduced in the Criminal Code.

**Enterprise end-user piracy of software—The 2006 Attorney General’s Circular:** Another element of the 2006 Circular has come to pose a significant obstacle in recent years to rights holders seeking enforcement against enterprise end-user piracy of software. The Attorney General’s Circular includes instructions that to meet the elements of a criminal offence, software piracy must have a “commercial purpose” (in Spanish, “lucro comercial”) as defined in the EU Enforcement Directive. According to the Circular, simply copying material internally in the absence of distribution does not constitute a commercial purpose, nor does the fact of saving quantities of money in the avoidance of software licensing fees. These obstacles have become especially worrisome since the adoption of amendments to the Criminal Code in 2010, which expose not only the management of a software infringing company, but the corporate entity itself, to liability for intellectual property crimes. Prosecutors at present will not make use of these new provisions in the absence of the unrealistic and unlikely circumstances of blatant software piracy outlined in the Attorney General’s Circular. This aspect of the Circular must be clarified to permit software piracy prosecutions to move forward.

**Police actions and prosecutions involving physical piracy:** The recording industry 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. 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. During 2012, Spanish authorities raided six labs and distribution centers for pirated DVD-Rs and CD-Rs, and arrested 834 street vendors. They seized 313,101 CDRs and DVDRs containing pirated content, and 373 DVD-R burners. Cases that do result in final sentences still have mixed results.

Spain: Summary of anti-piracy operations, year 2012 (physical piracy only)										
Actions	Arrested People	Total Carriers	Recorded Carriers		Blank Carriers		Burners	Inlays	Jewel boxes	Organized networks dismantled
			CD-R	DVD-R	CD-R	DVD-R				
834	397	331,311	142,417	170,684	7,160	11,050	373	45,008	22,210	6
<small>Note: All data above are not yet final as more information may be provided in the future. Data are provided by enforcement agencies and courts.</small>										

Court actions against street piracy defendants face a number of obstacles. As a threshold matter, a street vendor will not be subject to criminal charges unless pirate activity can be proven to have been for economic gain, an element difficult to prove against individuals who keep no business records. The year 2012 has seen a substantial increase in rulings handed down by criminal courts that refuse to grant any compensation for damages to rights holders. Many courts and judges hold that as long as the seized pirated product has not been distributed, it has not caused any economic damage to the rights holders. Recent amendments to the Criminal Code have reduced penalties for street piracy. Where rights holders bring private infringement actions, there were 155 judicial decisions in the last year, and 120 (78%) of these resulted in convictions. Of the negative decisions, 28 related to street vendors and frequently were closed as a result of expiration in the application of new Criminal Code amendments. The presence of a private prosecutor significantly increases the likelihood of conviction from 50% (in the absence of a private prosecutor) to 85% (where the private sector is able to participate).

ADESE, the Spanish entertainment software industry association, reports continuing difficulties in prosecuting individuals engaged in the distribution of illegal circumvention devices in 2012. Since 2008, there have been 11 high profile dismissals of criminal prosecutions against retailers of circumvention devices. As a result, police forces are largely unwilling to investigate complaints regarding circumvention device distributors due to the expectation that judges will likely find no grounds for conviction.

**Police actions and prosecutions involving end-user software piracy:** BSA reports that its work in 2012 with the police forces continued smoothly. There were 16 civil raids against infringing end-user companies in 2012, resulting in the recovery of substantial damages. In addition, 254 audit and warning letters were sent to infringing end-user companies. In the aftermath of the Attorney General's Circular, police forces do not initiate *ex officio* actions in cases of enterprise end-user software piracy. Instead, all of BSA's judicial cases involve the civil courts and raids must be initiated by the private sector. In 2011, the General Prosecutor of the State established a Prosecutor's Office for Computer Crimes, a positive development that should result in greater attention to digital piracy cases. In general, the knowledge level of prosecutors and civil and criminal judges on copyright issues needs improvement.

According to BSA, commercial courts are working through software piracy cases efficiently, except in certain cities such as Lérida or Córdoba, where courts will not grant raids despite written statements and affidavits from identified informants. Madrid has performed especially poorly in this regard, not only frequently rejecting grants for raids but jeopardizing raids that are conducted by sending minor bailiffs to accompany the raid rather than the secretary of the court, as required by law. Instead, the executive body of the judiciary (the "Consejo General del Poder Judicial") should issue instructions that *ex parte* searches always be conducted under the responsibility of the secretary of each commercial court to ensure effective results.

BSA reports that several other problems remain when they work with the civil courts:

**High bonds:** Nearly all *ex parte* searches require postings of bonds, 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.

**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.

**Calculation/valuation of damages:** The usual rule in calculating damages involves the full retail price of the product. However, a decision from a court of appeal (against the company "In Hoc Signo Vincas"), might have a negative effect because it reduces the valuation of damages for rights 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.

**Civil copyright enforcement:** The Commercial Courts ("Juzgados de lo Mercantil") in Spain have jurisdiction over copyright cases, but are unable to effectively handle the large amount of piracy cases among their many other areas of jurisdiction (including bankruptcy and trademark, to name a few). The 82 Commercial Courts in Spain handled 5,000 intellectual property cases in 2011 alone, apart from the other cases in their jurisdiction. Decisions are not issued for six to eighteen months, and appeals can take more than a year. Even if civil courts had the needed capacity, rights holders lack the legal footing to bring some of the most significant Internet piracy cases in Spain. Spanish law does not clearly implicate the very problematic linking sites as direct infringers. Furthermore, to prove any underlying direct infringement in such cases against websites would require evidence against end-users, which is unobtainable due to Spain's data protection laws (detailed further below). Another obstacle to civil adjudication of copyright infringement stems from an incorrect interpretation of articles 138 and 139 of the Spanish Intellectual Property Law, by which rights holders may apply for an injunction against intermediaries whose services

are used by a third party to infringe, even where the acts of the intermediaries as such are not infringing, “without prejudice to” the provisions of the Spanish e-commerce law (the LSSI). Courts have viewed this clause as allowing ISPs to avoid action altogether because of safe harbors contained within the LSSI — an interpretation which, if correct, would swallow any anti-piracy incentives for ISPs that might have been borne out of the risk of liability.

## **COPYRIGHT AND RELATED LAWS IN SPAIN**

Many legislative challenges in Spain remain to be addressed. Ambiguities in Spain’s laws have made criminal online infringement actions virtually impossible, and rights holders still lack many of the legal tools needed to bring civil actions against online piracy committed by operators of websites that choose more evasive methods than simple hosted piracy. While the Law on the Sustainable Economy (LES), if more effectively implemented in 2013, should 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 file-sharing and linking sites. There are also significant gaps in the Spanish legal infrastructure for the protection of copyright works through technological protection measures (TPMs) and specifically from the large-scale distribution of 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 reduce levels of Internet piracy.

**Confirming Criminal Liability for P2P Piracy Under the Law:** As explained in detail above under “Copyright Enforcement Actions in Spain,” the 2006 Attorney General’s Circular de-criminalizing infringing distributions of content by P2P networks has led to a halt in criminal enforcement actions against illegal file sharing. Rights holders have suggested an important amendment to the Criminal Code in Spain’s legislature that would clarify that websites acting as active intermediaries (such as linking sites) to massive IP infringement are subject to criminal penalties, with the hope that prosecutions can once again move forward against services in P2P piracy cases. Some are optimistic that the bill could pass in 2013, but if the legislation languishes this significant form of criminal online piracy will continue to go unaddressed in Spain’s courts. In actuality, Spain’s existing law does not limit criminal actions against online pirates to the extent proclaimed by the Attorney General’s 2006 Circular. Therefore, nothing is precluding the possibility for the Attorney General to correct the existing Circular with new instructions – without making changes in the existing law – which would be a speedy and direct solution that would permit P2P cases to move forward immediately.

**Incentives for ISP involvement in the removal of pirated content:** IIPA had expressed optimism in early 2012 that the establishment of the IP Commission in December 2011, described above, would establish an effective and speedier mechanism whereby illicit content could be declared infringing and taken down, establishing effective knowledge on the part of the relevant ISP for purposes of potential liability. However, the IP Commission’s view of treating only locker sites as responsible parties instead of also addressing linking sites, the slow pace with which cases are progressed, as well as the reluctance to refer cases to the Administrative Court for a blocking order leaves the new law in practice ineffective, without realizing the potential to incentivize ISPs to cooperate in the fight against online piracy.

Also, 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, continues to leave no incentive for ISPs to cooperate in the removal of infringing online works. In December 2007, the Spanish Parliament approved amendments to the LSSI as part of the government’s “2006-2010 Information Society Development Plan.” Article 16 of the LSSI as amended establishes liability for the ISP if it has effective knowledge of the infringement and does not act diligently to remove or block access to the infringing content. Unfortunately, rights holders cannot establish “effective knowledge” on the part of an ISP by directly notifying

a site operator of the presence of infringing material on 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 LES, 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 v. 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 the Spanish Data Protection Agency has determined that present law permits no such disclosure and the Court of Appeal has confirmed it, 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 v. 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.”

Courts have established that the Spanish E-commerce Law (the LSSI), which provides that personal data can only be disclosed in criminal proceedings, does not contravene 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. Proposals to amend Article 256 of the Civil Procedure Law (the LEC) to remedy this shortcoming did not move forward in 2011, but new proposals for amendments to the Civil Procedure law could move forward in early 2013.

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 WCT and the 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 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. IIPA therefore urges the Government of Spain to adopt an amendment to the Criminal Code that introduces an article 270.4 that states: “The same penalty shall also be applied to those who manufacture, import, distribute, put into circulation, make available, sell, rent, advertise for sale or rental, or possess for commercial purposes any means, device, product or component or who performs or provides a service which is primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of any effective technological measure that is used to protect any of the other works, interpretations or implementations in the terms set out in Section 1 of this Article.”

**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. 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 (US\$537) are now characterized as a misdemeanor rather than a crime, and the evidence of an adequate level of economic gain is a particularly evasive element for rights holders to prove. As a result, in practice courts now impose only fines or community service (from 31 to 60 days) in 95% of sentencing proceedings. 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 what was once one of the few bright spots in Spain’s enforcement of copyright.

In a positive development for the software sector, the amendments established 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

finances 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, Spanish prosecutors have not made use of this new provision, but instead refer to the Attorney General's May 2006 Circular requiring a "commercial purpose" but effectively denying that software piracy is undertaken for a commercial purpose under the law.

## **TRAININGS AND PUBLIC AWARENESS**

The content industries regularly offer training sessions and enforcement assistance in Spain. In 2012, the Judicial Police General Commissioner conducted programming in Madrid to bring together 60 top provincial senior officers in charge of Judicial police units, to discuss new strategies, tools, and emerging issues in physical and digital piracy. What is clearly needed is more government involvement in such seminars, particularly to increase the participation of judges and public prosecutors.

During 2012, altogether the rights holders organizations Promusicae, AGEDI, and FAP offered a total of 15 training programs on the investigation of IP protection and enforcement. Five of these courses were provided jointly with the Chair of Public Law (Cátedra de Derecho Público) of the Universidad Rey Juan Carlos. The programs trained a wide range of enforcement agency officials from the National Police, Guardia Civil, Customs Department, and local city police. A total of 1,850 individuals attended the training sessions, 350 certificates were issued, and 2,000 CDs were delivered containing IP training material. One example of these activities resulted from a June 2012 Memorandum of Understanding between Promusicae-AGEDI and the Association of Chiefs and Senior Offices of Local Police of Spain (UNIFEPOL), under which rights holders participated in several national meetings of local police senior officers, including a meeting on November 15, 2012 in Castellón in which rights holders addressed over 100 Chiefs of Local Police of the Valencia region.

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. An investment of 300,000 euros (US\$402,930) has been dedicated for a new training and awareness campaign, which aims to reduce levels of piracy among illegal channels and to target SMEs for similar results in piracy reduction. BSA encourages the Ministry of Industry to move forward with the campaign together with private sector support in 2013.

## **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 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) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR place Switzerland on the Watch List in 2013 and urges that USTR increase its bilateral engagement with Switzerland in the coming year.<sup>1</sup>

**Executive Summary:** Piracy in Switzerland is on the rise. Since early 2011, the percentage of Swiss Internet users who access unlicensed services in a given month rose from about 30 to about 35 percent,<sup>2</sup> well above the European average. The country has become an attractive haven for services heavily engaged in infringing activity, including Uploaded and Private Layer, all of whom have opened or moved headquarters or servers to Switzerland. From there, they provide a global service, effectively turning Switzerland into a major exporter of pirated content. This marked increase in infringing online activity can be directly attributed to the reality that Swiss law enforcement currently provides no effective consequences for digital copyright infringement on any scale.

Criminal and civil actions for online infringement under current legislation and case law have almost entirely come to a stop in the aftermath of the 2010 decision of the Swiss Federal Supreme Court in the Logistep case, which prosecutors have interpreted broadly as barring the collection and use of any IP address data identifying defendants in criminal copyright cases. This is despite a clarification from the Swiss Data Protection Authority (FDPIC) stating that under Switzerland's privacy laws, the Logistep decision only barred the specific data harvesting that was used in that case, and only from use in civil actions.

Some internet operators still refuse to comply with notices to remove infringing content from their servers, and due to the absence of a legal basis for liability of hosting providers, they have no incentive to comply with any such take down requests or to engage in serious negotiations about a voluntary agreement.

IIPA strongly encourages the U.S. Government to work with the Government of Switzerland, including through the Round Table meetings hosted by State Secretariat for Economic Affairs (SECO) that are set to continue in early 2013, to find near-term solutions that will: (1) clarify an evidentiary way forward for digital copyright infringement cases; (2) permit injunctions against unauthorized streaming or other infringing websites; (3) permit injunctions against intermediaries whose services are used by a third party to infringe copyright; and (4) establish a civil right of information parallel to that found in Article 8 of the EU Enforcement Directive.

### **PRIORITY RECOMMENDED ACTIONS FOR SWITZERLAND IN 2013**

- Resume enforcement of the current Copyright Act in the Internet environment in Switzerland's courts.
- If necessary, amend Swiss law to permit the collection of data available over digital networks for the purposes of enforcement of copyright against infringing activity.
- Clarify within Swiss law the responsibility of intermediaries that enable online piracy through hosting, streaming, linking, etc. and make remedies available to (1) issue injunctions against intermediaries whose services are used by a third party to infringe a copyright; (2) ensure availability of effective and rapid notice and takedown procedures; and (3) implement an effective and deterrent notice procedure against infringing customers.

<sup>1</sup>For more details on Switzerland's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2013SPEC301HISTORICALCHART.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2013 global issues, see our cover letter at <http://www.iipa.com/pdf/2013SPEC301COVERLETTER.pdf>.

<sup>2</sup> Source: IFPI based on data by comScore, Inc.



- Ensure that further copyright reform and the importance of effective copyright enforcement especially in the online environment continue to be addressed both through U.S.-Swiss trade dialogues and within the Government of Switzerland itself.
- Clarify Switzerland's exceptions to copyright to ensure that single copies for private use are permissible as long as they derive from a legal source.

## **THE NATURE OF PIRACY IN SWITZERLAND**

By the end of 2012, about 35 percent of all active Internet users in Switzerland use unlicensed services.<sup>3</sup> This is much higher than the European average of 26 percent, and significantly higher than the piracy rate in countries that actively engage in anti-piracy measures, such as France and Germany. Swiss Internet users are sophisticated in their use of a broad range of vehicles to access pirated content online. Peer-to-peer (P2P) activity for the purposes of sharing infringing material remains popular, both through P2P client networks (three of which, Ares Galaxy, eMule, and LimeWire, are among the top 20 most popular infringing services worldwide) and, increasingly, through BitTorrent networks. The use of cyberlocker services for storage and sharing of illegal files remains popular, although they have seen a decline since the closure of Megaupload in 2012, in favor of BitTorrent networks. Finally, illegal streaming continues to take place, and the use of stream ripping sites and applications, which permit a user to create a local copy of unauthorized streamed content, is strongly increasing and expected to reach the level of popularity of cyberlockers and BitTorrent sites soon. Since Switzerland's copyright law contains a private copy exception with no expressly stated legal source requirement, downloading and streaming from servers operated by pirates outside Switzerland are being portrayed as legal in Switzerland, as long as there is no uploading.

The consequences for the Swiss economy from these levels of piracy are stark. Between 2002 and 2012, 57 percent of full-time employee positions among Swiss music labels have been lost.<sup>4</sup> Between 2001 and 2011, the annual revenue of Swiss music labels has gone down by 59%. Some of the world's most popular Internet services for the unauthorized sharing of copyrighted works, such as the filehosters Uploaded, and the hosting provider Private Layer, which hosts a large number of illegal websites, have opened or moved their headquarters or hosting services to Switzerland. These services have a worldwide clientele and are accountable for a substantial part of the Internet traffic of pirated content. But for all this infringing activity, Switzerland cannot benefit from the revenues and taxes associated with legitimate sales. Legitimate streaming music platforms, such as Deezer, Simfy, Spotify, and Juke, have exploded in popularity globally, more than doubling their annual revenue each year, but account for only one percent of the revenue of Swiss music labels from Internet sales. Meanwhile, unauthorized TV and film content hosted in Switzerland is available on international sites such as TVDuck.com, nowvideo.eu, darkwarez.pl, piratenz.eu, and cyberlocker.ch., affecting worldwide markets ranging from Russia, to Poland, to the United States, the EU and beyond.

Switzerland also has a problem with an influx of French DVDs imported from Canada (presumably released after the motion picture's theatrical release in Canada has ended) and freely distributed while the motion pictures are still running in Swiss cinemas. Despite a provision in Swiss law that makes it unlawful to distribute DVDs when the movie is still in theatrical release, the law is not supported with criminal penalties and, as a result, there is no effective enforcement in Switzerland. This is especially harmful to theatrical releases in Switzerland. Although article 12 section 1*bis* of the Swiss Copyright Act states that copies of audiovisual works may not be distributed or rented if this prejudices the right holder's public performance right – e.g., if the audiovisual work is still in the theaters, an explicit criminal sanction for the violation of this principle is missing.

**Software piracy:** BSA | The Software Alliance (BSA) reports that the software piracy rate in Switzerland remains low – at 25% – but nonetheless concerns remain about unlicensed software use by business end-users,

<sup>3</sup> Source: IFPI trend analysis based on data by comScore, Inc. (October 2012).

<sup>4</sup> Source: IFPI survey among 33 Swiss music labels (December 2012).

particularly small- to medium-sized enterprises (SMEs). Internet piracy also continues to present significant challenges to the software market. In 2011, the software piracy rate in Switzerland remained at 25%, representing a commercial value of unlicensed software of US\$ 514 million.<sup>5</sup>

## **ONLINE COPYRIGHT ENFORCEMENT IN SWITZERLAND**

Online copyright enforcement in Switzerland has come to a grinding halt 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. Compounding matters, in November 2011, the Federal Council published a report on illegal uses of works on the Internet,<sup>6</sup> concluding that there is no need for new legislation. In later comments the Swiss Federal Institute of Intellectual Property (IPI), Switzerland's Federal agency in charge of patents, trademarks, industrial designs and copyright, also concluded that Internet piracy was not a priority for Switzerland. Traditionally, the IPI provides more support in relation to patents and trademarks, than to copyright matters. In early 2012, Switzerland's State Secretariat for Economic Affairs (SECO) initiated a Round Table of experts and stakeholders to seek a way forward for online enforcement. The Round Table meetings have yet to produce concrete results to meet the immediate need to stem Switzerland's growing online infringement problem. It is critical that the Swiss Government push forward with these efforts in 2013 for a near-term solution. Our concerns are of course exacerbated by the fact that the federal Council and IPI do not appear to believe that there is a problem that requires a solution.

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, as part of a for-profit exercise on Logistep's part, 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."<sup>7</sup> In fact, the Data Protection Commissioner has opined that the anti-piracy activities of the type carried out by IIPA members, including the music and film industry, are compliant with the Data Protection Act. However, in the aftermath of the Logistep decision, anti-piracy efforts have been completely undermined by an overly broad reading of the Logistep decision: public prosecutors have abandoned actions declaring as inadmissible evidence any IP addresses used to identify defendants and have even redirected their resources from copyright matters to other areas of law. 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. Consequently, because rights holders are unable to bring actions for online copyright infringement, Switzerland is in violation of its obligation to "ensure that enforcement procedures ... are available under [its] law so as to permit effective action against any act of infringement of intellectual property rights" under the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights.

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<sup>5</sup>BSA | The Software Alliance's 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Switzerland was 25%, representing a commercial value of unlicensed software of US\$ 514 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA's 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

<sup>6</sup>The report, issued in response to the March 2010 motion of Senator Géraldine Savary to determine whether better legislation is needed to protect music online, is available in German, French, and Italian at: <http://www.ejpd.admin.ch/content/ejpd/fr/home/dokumentation/mi/2011/2011-11-30.html>.

<sup>7</sup>See <http://www.edoeb.admin.ch/aktuell/01688/index.html?lang=en>.

In March 2012, SECO invited stakeholders (the Ministry of Justice, the U.S. Embassy, the Data Protection Commissioner, the Zurich state prosecutor and rights holders) to an industry “Round Table” aimed at evaluating solutions regarding data protection issues following the Logistep decision. The Round Table members agreed to evaluate whether the data protection problem could be resolved without a legislative amendment, and to set up an expert group to discuss legal and technical details. The Round Table met again in October 2012, agreeing to look into mechanisms to permit (1) injunctions against unauthorized streaming websites; (2) injunctions against intermediaries whose services are used by a third party to infringe a copyright; and (3) the civil right of information parallel to Article 8 Enforcement Directive. 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.

On a separate track, in August 2012, the Federal Council for Justice agreed to set up a stakeholder working group (known as “AGUR12”), and invited fifteen participants (six from the creative sector, three producers, three user representatives and three consumer group representatives). The AGUR12 will discuss Internet copyright enforcement as well as more general issues like collective licensing and private copying exceptions. It is mandated to present a report by the end of 2013, but so far the results of the meetings, at least in respect to enforcement measures, have been disappointing. IIPA urges the Swiss Government to maintain this momentum toward concrete recommendations that can address the fundamental gaps in Swiss online enforcement.

## **THE SWISS COPYRIGHT ACT AND RELATED LAWS**

In addition to the urgent developments regarding Internet piracy enforcement in Switzerland, IIPA also has other long-standing concerns with certain aspects of the copyright and related laws in Switzerland. On July 1, 2008, the Swiss law designed to implement the 1996 WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty (together, the WIPO Internet Treaties) entered into force. 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. Swiss authorities have argued that the private copy exception in Switzerland is similar to that in Germany, which has not been subject to rights holders’ complaints. However, the relevant article 53 of the German copyright law contains an important clause (and one that is absent from the Swiss law), that single copies for private use are permissible *as long as the copy is not made from an obviously illegally produced or publicly made available copy*. Such a provision is necessary to prevent the private copy exception from becoming an exception that swallows the rule.

Most recently, the overly broad view of the private copy exception has resulted in a December 2012 decision of the Federal Copyright Commission to supplement the tariff for set-top boxes with a license for so-called catch-up TV. This license allows for a time-shifted access to one or several pre-selected TV channels (30 hours with free access, 7 days with paid access). Contrary to the view of the Federal Copyright Commission that such services are covered by the private copying exception, this device clearly infringes the making available right by offering time-shifted programming at the discretion of the service provider, not at the command of the viewer or the authorization of the affected rights holders. It must be noted that the new Swiss rule of catch-up TV is isolated and cannot be found in any other European jurisdiction.

Second, Swiss law allows acts of circumvention of technological measures “for the purposes of a use permitted by law” (Article 39(a)(4)), an exception that is also far too broad, particularly given the inappropriately wide scope of the private copying exception. Taken together, these exceptions would allow individuals to circumvent access or copy control measures in order to copy from illegal sources and share with friends. As a consequence, devices and circumvention software are widely available in Switzerland.

Third, the new Articles 22a to 22c regarding mandatory collective administration provide overbroad benefits to state-licensed broadcasting organizations, at the expense of record producers and artists.

Fourth, Article 60(2) of the Swiss Copyright Act caps the remuneration payable to right owners (usually collected via collecting societies) at 10% of the licensees' income for authors and 3% for neighboring right owners. The Swiss artists and record producers collecting society "Swissperform" initiated arbitration proceedings against this cap 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." This share of the neighboring right owners is by far the lowest in Europe, where the income shares provide for at least an equal split between authors and neighboring right owners or even a two-thirds share for the neighboring right owners. 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 in early 2013. The next and final instance will be the Swiss Federal Court.

Fifth, there is a need for camcording legislation to combat the illicit recording of movies at movie theaters, a major source of pirated motion pictures on the Internet, as well as on street corners and flea markets around the world.

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.

# THAILAND

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA associations debated Thailand's Special 301 ranking in light of what appears to be an emerging political determination to take meaningful action to alter what have been long-standing problems. Ultimately, they agreed to recommend that Thailand be moved to the Watch List for 2013 in recognition of increased levels of cooperation and political direction. IIPA also recommends that USTR conduct an out-of-cycle review (OCR) to ensure adequate progress, in particular, that the Royal Thai government robustly implements a national plan in connection with the "Year of IP Protection" that it has announced, and that this be reflected in enhanced enforcement and legislative reforms, including the prompt enactment and implementation of effective 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 (i.e., so-called anti-camcording legislation).<sup>1</sup>

**Executive Summary:** The market for creative content in Thailand has never reached its full potential due to 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 many of these problems. Piracy remains rampant, with physical piracy largely being replaced by online and mobile device piracy as the Thai populace becomes more wired into the latest technologies. "Media box" digital drives filled with hundreds of movies and loads of other content or enabled to illegally download sell at low prices at the malls. Illegal camcording in Thailand continues to spiral out of control, with many audio dubs of U.S. films contributing to worldwide piracy rings (not just Thailand), while local Thai films are being illegally "cammed" within days of their release. On a positive note, the software industry has seen some modest progress against enterprise end-user piracy of software. In addition, the passage of amendments to the Money Laundering Prevention and Suppression Act B.E 2542 (MLPSA), which includes intellectual property infringements as a predicate money-laundering offense, simply awaits royal endorsement and right holders will have another tool to address significant piracy concerns, including the possibility of freezing assets related to piracy. The Royal Thai government has designated 2013 the country's "Year of IP Protection,"<sup>2</sup> and the Deputy Minister of Commerce has indicated he will head the establishment of a new "Operations Centre for the Suppression of Intellectual Property (IP) Infringement."<sup>3</sup> The legitimate commercial market in Thailand continues to grow, as, for example, new cinemas are expanding into provincial areas.<sup>4</sup> Notably, WIPO and Oxford Economics studies on the economic contribution of creativity to the Thai economy<sup>5</sup> suggest that but for the problems of piracy in Thailand, the contribution of the copyright industries to the Thai economy would be even more robust.

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<sup>1</sup>IIPA has already communicated to the Royal Thai government that the current draft of such legislation presently under consideration is insufficient in this regard. For more details on Thailand's Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2013SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

<sup>2</sup>Royal Thai Embassy Washington DC, *Government Designates 2013 "Year of IP Protection,"* December 2012, at <http://www.visetkaew.com/wp/category/thailand-2/page/3/>.

<sup>3</sup>*Thailand Declares War on Piracy, Intellectual Property Violation*, Pattaya Mail, January 21, 2013, at <http://www.pattayamail.com/news/thailand-declares-war-on-piracy-intellectual-property-violation-21149>.

<sup>4</sup>The market for local music in Thailand has shrunk due to consumer behavior changes and substitution of digital downloads. These changes have had a detrimental effect on investing in music, although, as a result, international and independent repertoire have gained market share.

<sup>5</sup>World Intellectual Property Organization, *The Economic Contribution of Copyright-Based Industries in Thailand*, 2012, at [http://www.wipo.int/copyright/en/performance/pdf/econ\\_contribution\\_cr\\_th.pdf](http://www.wipo.int/copyright/en/performance/pdf/econ_contribution_cr_th.pdf). This study demonstrated that in 2006, the copyright-based industries generated Bt350.96 billion worth of total value-added, representing 4.48 percent of Thailand's GDP. In terms of employment, the industries hired 1.02 million people, which accounts for 2.85 percent of the total employment of the country. In 2006, the total export value is US\$5.73 billion, which represents 4.56 percent of the total of exports of Thailand. In another recent study conducted by Oxford Economics, *The Economic Contribution of the Film and Television Industries in Thailand*, the film and television industry in Thailand contributed US\$2.22 billion (Bt68.3 billion) to the country's economy and supported 86,600 jobs in 2011. The industry also generated tax revenues of US\$81.4 million (Bt2.5 billion). See Oxford Economics, *The Economic Contribution of the Film and Television Industries in Thailand*, at [http://www.mpalibrary.org/assets/The\\_Economic\\_Contribution\\_of\\_the\\_Film\\_and\\_Television\\_Industries\\_in\\_Thailand1.pdf](http://www.mpalibrary.org/assets/The_Economic_Contribution_of_the_Film_and_Television_Industries_in_Thailand1.pdf).



## **PRIORITY ACTIONS REQUESTED IN 2013**

### **Enforcement**

- Investigate and prosecute greater numbers of significant piracy cases, including against mall owners, given the opinion by the Royal Thai government that landlord liability is available under criminal law, with deterrent fines and custodial sentences.
- 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, including within the Department of Intellectual Property (DIP), and increased resources for the Technological Crime Suppression Division (TCSD) of the Royal Thai Police.
- Ensure effective enforcement against online infringements, and 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 infringements in Thailand using foreign websites.
- Close notorious piracy markets (“Red Zones” and “Yellow Zones”).
- Effectively address book counterfeiting and piracy and unauthorized copying 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.
- After Royal assent, fully implement the amended Money Laundering Prevention and Suppression Act B.E 2542 (MLPSA), which includes intellectual property infringements as a predicate money-laundering offense, to address significant piracy concerns, including freezing assets related to piracy.

### **Legislative**

- 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 protect against the circumvention of technological protection measures, among other changes.
- 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, subject to interdiction by cinema employees and the police and immediate seizure of the machinery used in violating the law.
- 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.
- Add IP crimes to Computer Crimes Act to create a more effective remedy against online infringement.
- Issue sentencing guidelines and adopt minimum sentencing that provides a real deterrent to infringement.
- Amend the Evidence Law to allow the admission of digital evidence in copyright cases before the court.<sup>6</sup>
- Fully implement the Cabinet Resolution on legal software use, procurement, and installation in the public sector.
- 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 potentially 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.

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<sup>6</sup>We understand that digital evidence admission is included in some electronic transactions laws, but are unaware of whether this is sufficient for copyright cases.

## PIRACY UPDATES IN THAILAND

IIPA's previous reports document in detail various piracy issues in Thailand and the harm caused to the U.S. content industries. In addition to the updates below, significantly, we note the damaging effect piracy has had on local Thai creators and creative industry.<sup>7</sup> Two giant local music companies, RS and GMM Grammy, have shifted resources away from music and explored new opportunities in media and broadcasting. According to public records, GMM Grammy is only a 40% music company, instead making plans to license sports events like UK Premier League and sell satellite set-top boxes for exclusive broadcasting of football matches. Anecdotally, for the first half of 2012, revenues were flat/slightly down once again for both physical and digital sales. While new legal services for music are launching in Thailand, like iTunes, Deezer, and Spotify, this cannot be said to be evidence of the Thai music market bouncing back at this stage.

**Media Box Piracy An Emerging Threat:** "Media box" piracy is a phenomenon hitting Thailand hard. Many of the malls now boast such boxes, including "HD players," in which multiple gigabytes of storage space can accommodate 200 high definition movies and other content. The boxes only cost around US\$100 and customers can update the hard disk with new movies for approximately US\$30 per update. Moreover, the boxes are inextricably linked with Internet piracy, as websites provide movie lists for customers to pre-select and the movies will be delivered on the hard drive *via* postal service. These boxes are available in Pantip Plaza and other malls containing IT products, including Ban Moh, Klong Thom, MBK Mall, which also still boast hard goods optical disc piracy.

**Internet Piracy Problem Worsens in Thailand:** 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. Faster speeds, growing infrastructure, and lower Internet subscription fees,<sup>8</sup> mean an estimated 32.5 million Thai have access to the Internet, either through fixed lines, wireless, or mobile 3G.<sup>9</sup> Fixed line broadband penetration exceeded 3.7 million as of December 2011.<sup>10</sup> Internet piracy in Thailand can be categorized into unlawful uses of cyberlockers (increasingly proliferating in Thailand, as there are now 17 in general use),<sup>11</sup> "webboards"/bulletin boards/forums (which can be free or paid membership services),<sup>12</sup> BitTorrent index and tracker sites (acting as intermediaries for BitTorrent distributors and downloaders),<sup>13</sup> streaming sites, social media sites (used to locate infringing files), and "clouding," with cyberlocker services allowing massive uploading and downloading and advertising of illegal content being the most popular trend in Thailand. The music industry estimates that around 80% of Internet users in Thailand access music for free illegally, while only 20% buy music from legal services.<sup>14</sup>

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<sup>7</sup>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 2012 was down, 33 illegal copies of Motion Picture Association of America (MPAA) member company movies were sourced to illegal camcorders in Thailand.

<sup>8</sup>Many 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.

<sup>9</sup>*Smartphones Driving Skyrocketing Internet Use*, Bangkok Post, May 15, 2012, at <http://www.bangkokpost.com/business/telecom/293332/smartphones-driving-skyrocketing-internet-use> (citing Internet Innovation Research Center report).

<sup>10</sup> International Telecommunication Union, *Fixed Broadband Subscriptions 2000-2011*, at <http://www.itu.int/ITU-D/ict/statistics/material/excel/Fixed%20broadband%202000-2011.xls>, accessed on January 10, 2013.

<sup>11</sup>Cyberlockers in Thailand are both foreign and local with some charging a membership fee and some being free of charge. There are 17 popular cyberlocker sites in Thailand. The local cyberlockers are usually responsive to notices related to infringement.

<sup>12</sup>Web-boards are in serious competition with one another to attract the greatest numbers of users and viewers to lure ad revenues. Users can generally join and start using the board without any registration, however, due to enforcement and monitoring by the local recording industry group TECA, some web-boards now require users to log in before joining in order to identify the IP addresses and block access of anyone monitoring their activity. Many web-boards have cooperated with right holders by imploring users not to post illegal music files. Many have also assisted right holders in having removed, or allowed right holders to remove, unauthorized files. Paid web-boards involve paid memberships which advertise faster downloading, but keep the files stored themselves thus requiring a fee to be paid either by transferring money to the web-board's bank account or through a cash card (such as Bt50 to Bt3,000 "True Money" cards). TECA reports closing down two web-boards so far due to piracy.

<sup>13</sup>In 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. 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. Those 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\$100) 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. In 2011 and 2012, TECA had 17 BitTorrent tracker sites in Thailand closed down.

<sup>14</sup>The music industry also indicates cloud computing ("clouding") will be used widely by Internet users to store and disseminate content and they anticipate illegal uses of the cloud will be the next generation of piracy.

Industry 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 has occurred in Thailand through online stores selling hard goods pirated software accompanied by the online availability of “key generators” for circumvention offered for free download. Some of the most notorious piracy websites in the world are servicing the Thai market, including *4Shared*, registered in the British Virgin Islands, a cyberlocker which provides access to large libraries of infringing files.<sup>15</sup> *4Shared* is the 17th most visited site in Thailand according to Alexa.com and provides access to infringing Thai and U.S. (and other international) music and has an estimated 50 million Thai visits to the site.

**Camcorder Piracy Traced to Thailand Continues to Harm Film Market:** The problem of camcording of full-length films in movie theaters in Thailand remains a major concern of the industry in 2012, with 33 detections of illegal camcording of Motion Picture Association of America titles.<sup>16</sup> Many Thai-dubbed versions of Hollywood movie DVDs have been detected with the audio having been “cammed” in Thailand and the pictures generally camcordered elsewhere. Local Thai movies are fully camcordered within a couple of days after the films’ releases. There is a 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 various Internet piracy services (e.g., P2P or linking sites), becoming pirated hard goods within a matter of days.

**“Red Zone” Piracy:** The “Red Zone” malls remain in full operation, and in December 2012, USTR once again listed the “Red Zones” and other areas as “notorious” piracy markets. These include Panthip Plaza, Klong Thom, Saphan Lek and Baan Mor shopping areas, among others, as well as Chatuchak, MBK Shopping Centre, Siam Square, Klong Thom, Sukhumvit Road and Patpong Market in Bangkok, Karon Beach and Patong in Phuket, ITCity in Pattaya, and the Rong Klua and Friendship Border Markets at the Aranyaprathet border crossing with Cambodia.<sup>17</sup> The situation in the malls remains a disaster, with vendors openly selling infringing copies of copyright content, including films (DVDs/Blu-ray discs, manufactured in China and imported through Myanmar have a huge impact on the legitimate market in Thailand, selling for approximately US\$1 per DVD and US\$8 for Blu-ray, and many pirated DVDs are local dubbed versions which are sourced back to illegal camcording),<sup>18</sup> music (largely burned CD-Rs with MP3s, but also China imports through Myanmar, priced at Bt100-300), software, games,<sup>19</sup> and published

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<sup>15</sup>IIPA listed *4shared* as a notorious market in its Special 301 out-of-cycle review submission to the U.S. Trade Representative to identify notorious piracy markets. See International Intellectual Property Alliance (IIPA), *Submission Re: IIPA Written Submission Re: 2012 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 77 Fed. Reg. 48583 (August 14, 2012), Docket No. USTR-2011-0011, September 14, 2012, at [http://www.iipa.com/pdf/2012\\_Sep14\\_Notorious\\_Markets.pdf](http://www.iipa.com/pdf/2012_Sep14_Notorious_Markets.pdf). *4Shared.com* is a popular one-click hosting site (cyberlocker), with a current Alexa.com 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.

<sup>16</sup>Camcording is particularly damaging in Thailand because it fuels rampant online piracy, negatively impacting worldwide distribution and prevents the establishment of legitimate online distribution platforms for all films including major and independent film producers. Camcording also threatens the continued growth of the Thai theatrical box office marketplace.

<sup>17</sup> See United States Trade Representative, *Out-of-Cycle Review of Notorious Markets*, December 13, 2012, at <http://www.ustr.gov/sites/default/files/121312%20Notorious%20Markets%20List.pdf>. IIPA noted Panthip Plaza, the Klong Thom, Sapan Lek, Baan Mor Shopping Area, Patpong and Silom Shopping Areas, the Mah Boon Krong (MBK) Center, the Sukhumvit Road area (Thailand), etc. in its notorious markets filing. IIPA Review of Notorious Markets, *supra* note 15. The Royal Thai government also maintains “yellow zones,” which are targets to be aware of for possible piracy activities.

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

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

materials. Pirated goods are also available in other cities such as Chiangmai and Pattaya. The piracy in these “red zones” and other locations noted is so egregious that there is essentially no excuse for continued non-action on the part of enforcement authorities. Piracy in these locations should be shut down immediately. IIPA notes enforcement in these areas was mentioned as a goal of the Royal Thai government in 2012.<sup>20</sup>

**Enterprise End-User Software Piracy Level Remains High, and Industry is Harmed by Hard Disk Loading and Circumvention of Technological Protection Measures (TPMs):** The software piracy rate in Thailand was 72% in 2011, a decrease of one percent from 2010, with a commercial value of this unlicensed software of \$852 million.<sup>21</sup> Use of unlicensed software by enterprises remains a leading concern. Reducing PC software piracy would have a net positive effect on Thailand’s economy. A 2010 study done by research firm IDC for BSA estimated that decreasing Thailand’s software piracy rate by ten points over a four-year period would add US\$1.3 billion in GDP to Thailand, produce an additional \$73 million in tax revenues and create 2,175 new high-wage IT jobs. The gains would be even greater if the piracy rate was reduced by 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 software industry include hard disk loading of illegal software onto computers at the point of sale, the use of illegal software programs to circumvent TPMs used to protect legitimate software, and software piracy occurring at Internet cafés. The failure to fully implement the existing Cabinet Resolution on legal software use, procurement, and installation in the public sector remains an irritant. BSA has proposed software asset management (SAM) policy initiatives to DIP and the Software Industry Promotion Agency (SIPA) and is currently working with a number of Thai government agencies to bring to life the government’s commitment to make 2013 the “Year of IP Protection,” including to help train SAM personnel and implement a SAM policy to reduce software piracy in the public sector.

**Mobile Device Piracy Worsening:** Mobile penetration is now well over 100% in Thailand, and right holders report that mobile device piracy by mobile retailers seriously harms right holders in Thailand. Many shops engage in the illegal business of providing unauthorized copies of content onto phones, tablets, 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. The shops typically charge Bt100 (US\$3.35) per GB for downloading, while some charge Bt50 (US\$1.67) per music album and some charge a Bt800-1,200 (US\$27-\$40) one time fee with free updates. To avoid being caught, these retailers often are grouped together and may pay protection fees to police. They also sometimes share a hidden spot for downloading which has a login and password and has a Wi-Fi or Bluetooth connection.

**Book Piracy:** The book and journal publishing industry continues to face the following problems in Thailand: print piracy, illegal photocopying, unauthorized translations, and online piracy. Copy shops continue to copy books for students, primarily on a “print or copy 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 compilation, and claiming authorship of the work. Other pirated materials include novels, travel guides, history books and foreign language newspapers. Additionally, as in previous reports, IIPA notes that the Royal Thai government’s efforts to address the production and export of counterfeit books have not yielded any actionable results and neither has there been substantive improvements to

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<sup>20</sup>See Kingdom of Thailand, Ministry of Commerce, Department of Intellectual Property, *Thailand’s Implementation on Intellectual Property Rights (February 2011-2012)*, February 16, 2012, para. 2.3.1.

<sup>21</sup>BSA | The Software Alliance’s 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Thailand was 72%, representing a commercial value of unlicensed software of US\$852 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

the protection of published works.<sup>22</sup> 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 book piracy, and in particular, the rampant unauthorized commercial photocopying occurring on and around university campuses.

**Hard Goods Piracy Through “Virtual Shops”:** As hard goods piracy has waned somewhat, it is being replaced by “virtual shops” offering physical pirated products for sale through their websites. Customers browse, picking music tracks by clicking their mouse, filling in their address and transferring money to a designated bank account. Within a couple of days, the made-to-order piracy is delivered. Virtual shops are also apparently popular within offices, and offer not only pirated discs but counterfeit wristwatches and leather goods as well.

**Pay-TV Piracy (Cable and Satellite), Public Performance Piracy:** Piracy of cable and satellite broadcasting signals in Thailand, which involves the unauthorized transmission or retransmission of U.S. programming over systems from original cable or satellite transmissions, remains a major problem, especially outside of Bangkok. While the National Broadcasting and Telecommunications Commission was established in September 2011, and established a Broadcasting Committee to handle regulation of the broadcasting industry, there is not yet effective government supervision of pay-TV content. In recent years, some unlicensed new operators of satellite channels have entered the industry with business models based on stolen content, and have achieved substantial business success without any hindrance by Royal Thai government authorities of their illegitimate operations. Some satellite “movie channels” are made up of unauthorized DVDs, including recent films not yet released for any television distribution in Southeast Asia. There are also now at least four completely unlicensed direct-to-home satellite TV companies. Broadcast of these channels from satellites over Asia makes them available not only in Thailand, but to other countries as well. Thai piracy therefore continues to harm other markets as well. Pay-TV content continues to be freely stolen and re-sold by many (but not all) provincial cable operators. The industry association CASBAA has attempted to ensure that in broadcast regulations, an explicit condition for a broadcast license includes that “the operator must not commit, permit or suffer any conduct which is an infringement of any intellectual property right,” but thus far, no such conditionality has been accepted. 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.

## **ENFORCEMENT UPDATES IN THAILAND**

IIPA views positively the announcement by Deputy Commerce Minister Nattawut Saikua in late January 2013 that the Policy Committee of the National Intellectual Property Bureau had moved to set up an “Operations Centre for the Suppression of Intellectual Property (IP) Infringement” to deal strictly with the long-standing issues of piracy. The Deputy Commerce Minister will reportedly head the center, which will, in addition to taking swift action against piracy in Thailand, also monitor money trails, tax payment records, and money laundering activities of piracy suspects.<sup>23</sup> In early 2012, DIP reportedly infused a budget of Bt8.3 million (then US\$266,000) for the establishment of a ‘piracy suppression information system’ linked between related enforcement authorities, in order to serve as a connection between all related agencies in analyzing piracy information in the country. There is no indication that this system has been launched or had any positive effect against piracy in the market.

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<sup>22</sup>IIPA’s previous reports noted that publishers uncovered a sophisticated book counterfeiting operation, which used a network of consignees and shell companies as fronts for exporting counterfeit books to the U.S. IIPA’s 2012 report also noted that the Special Committee formed by the Royal Thai government in 2010 to address this problem did not produce any meaningful results.

<sup>23</sup>*Thailand Declares War on Piracy, Intellectual Property Violation*, *supra* note 3. We note that the Royal Thai government, in its submission in February 2012 to the United States Trade Representative in the Special 301 process, indicated that the National Committee on Intellectual Property Policy had set up the Sub-Committee on Prevention and Suppression of Intellectual Property Rights Violations chaired by the previous Deputy Minister of Commerce and with essentially the same ends, so it can only be hoped that this time the task of seriously addressing IPR violations will be taken up with a view to making significant changes in the enforcement structure and effectiveness of the various organs at work to fight piracy in all its forms. See *Thailand’s Implementation on Intellectual Property Rights (February 2011-2012)*, *supra* note 20.

Most industry sectors report strong relationships with DIP, the Department of Special Investigation (DSI), the Economic Crimes Division (ECD)<sup>24</sup> under the Central Investigation Bureau of the Royal Thai Police, the Technology Crime Suppression Division (TCSD),<sup>25</sup> and the Office of the State Attorney. Over the years, the IP and IT Courts offered a well-informed core of prosecutors and judges on IP matters, although in recent years both civil but especially criminal cases have yielded fewer satisfactory results. Notwithstanding these good relationships, the Thai enforcement system remains difficult, in the lack of consistency and overall lack of effective deterrence in dealing with Internet, mobile device, mall, end-user, and book piracy, lack of mechanisms to address online piracy (including no notice and takedown and no efforts to halt repeat infringers or disable foreign websites used to infringe), and no enforcement against illegal camcording. For example, industry reports the ECD was inactive in enforcing physical piracy in 2012, but they are hopeful that the reshuffle of the Chief Commander in October 2012 will result in improved enforcement responses in 2013. Industry has recently (in late January 2013) been informed from a high-ranking official that the ECD will informally set-up an “internal task force” to deal with Internet piracy particularly.

Industry reports some continued difficulties in obtaining issuance of search warrants, an issue raised in this report for many years.<sup>26</sup> Industry also reports that generally enforcement officials in Thailand have not done a credible job to date running cases up the chain (hard goods cases are “a cut-out process” with no tracing to the source or the mastermind). IIPA notes much public information about tip-offs, and remains concerned about such difficulties in enforcement and other irregularities.<sup>27</sup> Such corruption has no place in a working IP enforcement system. Moreover, although cases appear to be moving somewhat more quickly through the courts, the results have been disappointing, with judges urging paltry settlements and failing to impose deterrent jail sentences for commercial scale infringements. These are all endemic and systematic problems which must be addressed by the new “Operations Centre for the Suppression of Intellectual Property (IP) Infringement.”

**Internet Enforcement:** Growing Internet piracy in Thailand requires a multi-faceted approach, since the different methods of infringing online require different enforcement responses, and since those who engage in Internet piracy range from professionals who establish services for commercial gain, to amateurs or students who are tech-savvy but have no commercial motive (other than to obtain free content). Both types of online piracy, regardless of motive, hinder the development of authorized online distribution. Unfortunately, the Royal Thai government has not to date kept up with the challenges apart from dedicated actions of some ECD and TCSD officers.<sup>28</sup> For example, TCSD was active in 2011 in the preparation and execution of enforcement against 13 unauthorized websites making available illegal content for file sharing, and takedown notices to infringing websites targeting Thailand (even those located outside of Thailand). Most other positive Internet enforcement has been due to self-help<sup>29</sup> and some ISP cooperation. Larger and more established ISPs have been responsive to member notices about online infringement, and voluntary takedown rates among them remain fairly good. In 2012, takedowns occurred in 574 cases out of 624 notifications to ISPs by the music industry group TECA, or a 91% takedown rate, with some cases resulting in immediate action. Some ISPs have assisted in searching for illegal files kept on their rented (colocation) servers.

Without an MOU with ISPs, without a legal framework to address the issues, and without a mechanism to deal with repeat infringers and to disable access to infringing websites, the situation in Thailand will continue to grow more severe. The draft amendments to the Copyright Act would unfortunately not provide a panacea as drafted, since action on the part of ISPs would still require a court order (as of now, some ISPs that provide colocation services ignore notices and fail to cooperate, requiring TCSD to obtain an Order which they have done on occasion).

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<sup>24</sup> See [www.ecdpolice.com](http://www.ecdpolice.com).

<sup>25</sup> See [www.tcsd.in.th](http://www.tcsd.in.th).

<sup>26</sup> The Royal Thai government agreed to follow up on ensuring swift issuance of search warrants in its Special 301 report to USTR in February 2012. See *Thailand's Implementation on Intellectual Property Rights (February 2011-2012)*, *supra* note 20, para. 2.3.1.

<sup>27</sup> *The Knock-on Effect for Bangkok's Knock-offs*, Bangkok Post, January 20, 2013, at <http://www.bangkokpost.com/news/investigation/331682/the-knock-on-effect-for-bangkok-knock-offs>.

<sup>28</sup> Most Internet piracy enforcement in 2012 was done jointly between ECD and TCSD. ECD usually spearheads the raid, while TCSD provides technological support to ECD.

<sup>29</sup> For example, the local recording industry group TECA found out the unreleased album of Michael Jackson, “Blue Gangster,” was leaked and sold online by a German national and his Thai girlfriend. An investigation found the IP address of the seller, the email address of the girlfriend was used to make a test purchase, and an arrest warrant was issued by the IP/IT Court on April 2, 2011. The German national fled Thailand and has reportedly not been apprehended. ECD has issued a search warrant and is in the process of cooperating with Interpol's Bangkok Office to alert the foreign country where he is believed to be.

While the Royal Thai government has facilitated discussions between right holders and ISPs, these have ended up being mostly listening sessions and have not led to greater ISP cooperation. It will also be critical to develop expertise within DIP and other agencies in IT who also will have the capacity, resources, and will to investigate and effectively enforce against Internet piracy services, many of which engage in increasingly damaging and evasive infringements. For example, Internet pirates (services, businesses, and users) often hide their identities and addresses, and ways to address such concerns and impediments to effective enforcement in this space must be devised.

**Lack of Effective Remedy Against Illegal Camcording:** IIPA is deeply disappointed that the Royal Thai government has failed to address the issue of illegal camcording. While the government claims illegal copying of a film in a movie theater is already an infringement under the current Copyright Law, in the end, an effective standalone remedy will be needed to address this concern. DSI has enlisted industry's support to help identify the primary camcorder syndicate groups responsible for the majority of illegal camcording, but unfortunately, there has been no consistent cooperation in investigations into illegal camcording and there remain reports of leaks in investigations and/or raid schedules in 2011. In addition, the Royal Thai government indicates it has "combated unauthorized camcording" through awareness-raising campaigns at cinemas and that warning signs are up at cinemas and cinema employees are being asked to patrol their cinemas regularly. With due respect, these actions cannot substitute for a strong *sui generis* law and swift enforcement against those who are camcording and causing severe damage to the industry through the release of their "cams" on the Internet or in hard goods formats.

**Lack of Overall Effective Civil Remedies or Criminal Penalties:** While the establishment of the IP & IT Courts in 1998 held out great hope for a sustained workable judicial system to protect copyright, in recent years, both civil judgments and criminal convictions have failed to meaningfully deter further infringements for most of the copyright industries. Civil judicial remedies have ceased being effective due to very low civil damage awards that are far lower than the costs and attorney's fees associated with bringing civil cases in Thailand. In addition, there are no additional or punitive damages in the Thai legal system, nor are there pre-established (statutory) damages. Civil procedures are extremely lengthy with an average pendency of three years from filing to judgment. Plaintiffs also bear all the burdens of proof, from copyright ownership to losses and damages, which becomes burdensome but critical since profits awarded in civil cases are so low in Thailand. The criminal system has not provided much better relief. In order to more effectively address the endemic piracy problem in Thailand, a credible, deterrent criminal remedy must be available. Very few raids achieve meaningful results which would, when publicized, have a deterrent effect on piracy activities in the country. For example, in 2012, the music industry reported 113 CD shop raids and 9 website actions resulting in the seizure of thousands of discs. Eighty-nine criminal cases were commenced in 2012, and there were 92 reported convictions. Out of those, though, only nine cases resulted in jail sentences, with eight resulting in suspended sentences; more than half of the cases commenced in 2012 remain pending. Out of the criminal convictions, 33 cases resulted in criminal fines, but the total amount of fines was just over US\$45,000 (i.e., an average fine of almost US\$1,400 per case). The Royal Thai government noted 9,844 overall IP raids in 2011 resulting in seizures of over 4.4 million infringing items, and 576 Customs actions in 2011 resulting in seizures of over 290,000 items. None of these statistics are broken down by IP type, although the government indicates "copyright violations predominate." This is helpful information, but there is no breakdown of criminal cases resulting and penalties imposed against those raided, investigations up the organized crime chain, or deterrent outcomes. These numbers are all telling as anecdotal evidence of the problem of lack of deterrence.

**End-User Enforcement:** The software industry continued to receive positive support from the Royal Thai government including ECD for end-user software piracy actions, noting a growing number of criminal raids and civil cases conducted in 2012. 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. For the most part, the software industry has found civil and criminal penalties awarded in end-user cases to be sufficient. The number of raids in 2012

increased, with 187 raids run against software piracy by enterprise end-users, compared with 33 in 2011 and 152 raids in 2010. There have been a couple of criminal cases in recent years, with some positive outcomes.<sup>30</sup>

**Mobile Piracy Enforcement Non-Existent and Marred by Difficulties:** 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. There are some reports of tip-offs of raids which only exacerbates the problem.

## **COPYRIGHT LAW UPDATES/RELATED ISSUES**

**Flawed Camcording Bill Should be Revamped Prior to Passage:** IIPA appreciates that the Royal Thai government has drafted a bill to attempt to address the issue of unauthorized camcording of motion pictures in Thailand. Since early 2006, IIPA has provided ample evidence of the problem to the Royal Thai government, and advocated that the Royal Thai government seek an effective approach to deal with illegal camcording – the unauthorized copying or transmission of, or attempt to copy or transmit a whole or part of any audiovisual material off a cinema screen. Since 2007, when IIPA and industry first discussed with the Royal Thai government model legislation to deal with illegal camcording in Thailand, Thailand has grown to have one of the highest instances of illegal camcording in the world, seriously harming commercial markets domestically and abroad. Something must be done urgently to address this significant problem, which represents a significant irritant to the film industry and epitomizes problems faced by other industries. Illegal camcording harms not only U.S. and other foreign creators, but local Thai creators, cinema owners, and all those involved in the film and television businesses in Thailand. Thus, it is in the Royal Thai government’s interest and the interest of the Thai people to firmly address the problem of illegal camcording.

Failure to act will mean the Royal Thai government fails to make available in its laws and in practice enforcement procedures so as to permit effective action against illegal camcording, or to provide for an expeditious remedy as to the same, and as required by Thailand’s current international obligations. From our experience, when anti-camcording laws were adopted in other countries/territories, including in the Asia region, the number of cases of illegal camcording went down. The record is clear in Hong Kong, Japan, South Korea, Malaysia, and the Philippines. In the Philippines for example, before the Philippine anti-camcording law was passed in 2010, there were 86 cases between 2008 and 2010. Since the start of 2011, there have been just 5.

It is therefore deeply disappointing that the latest draft legislation which we have reviewed falls well short of the goals set out in model approaches provided to the Royal Thai government. Indeed, the current draft, if enacted, would fail adequately to address the problem of illegal camcording in the country, and could worsen the situation by imposing a new broad exception for certain acts of camcording (acts which now presumably remain illegal). The following are some brief and non-exhaustive comments on the draft Bill we have been provided and reviewed, compared with key elements of an effective anti-camcording law. Comments have also been provided to the Royal Thai government.

- **Effective Legislation Would Establish an Offense for Unauthorized Use or Possession of an Audiovisual Recording Device:** A model approach to deal with illegal camcording would make it illegal to use or possess an audiovisual recording device<sup>31</sup> to copy or transmit, or attempt to copy or transmit, the whole or part of any

<sup>30</sup>In 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).

<sup>31</sup>An “audiovisual recording device” should be defined as including “a digital or analogue photographic or video camera, or any other technology or device capable of enabling the recording or transmission of a cinematograph film or other audiovisual work, or any part thereof, regardless of whether audiovisual recording is the sole or primary purpose of the device.”

audiovisual material (including an audiovisual work or its soundtrack) in an exhibition facility. As a “time and place” offense, this creates an effective approach for cinema owners, right holders, and police, to work in conjunction to stamp out illegal camcording before an entire film’s commercial release pattern is destroyed. Unfortunately, the draft merely covers actual “reproduction” – an act which should already be covered under the copyright law, but which is encumbered by laborious and ineffective processes to seek redress. By contrast, the model approach which should be adopted in the Royal Thai government’s next revision to the draft should create a separate offense for the “use” or “possession of” (or for one who attempts to use or possess) an audiovisual recording device in an exhibition facility. The grounds for the offense must not be tied to motive, although the penalties should be enhanced (e.g., doubled) if it can be proven that the illegal camcording activity (or attempt to engage in such) was done for the purpose of the sale, rental or other commercial distribution.

- **Effective Legislation Would Include Search and Seizure Remedy With Respect to the Offense, as Well as Detention Remedy:** Establishing the “use” or “possession” offense, effective legislation would also provide for the authorized enforcement persons to: 1) enter and search any exhibition facility if an authority has reason to suspect that an offense has been or is being committed; 2) search anyone suspected of having in his possession any audiovisual recording device in respect of which an offense has been committed; 3) seize (or remove or detain) any audiovisual recording device or other thing which appears to him to be or to contain evidence of an offense; and 4) detain any person if, after inquiry, there are reasonable grounds for believing the person is connected with the subject-matter of the search and it is necessary to detain the person in order to be able to adequately perform the search. While it is generally assumed that cinema owners and other operators of exhibition facilities in which illegal camcording takes place will have the incentive to cooperate in investigations, it may also be useful to provide that operators of exhibition facilities or other persons who appear to be responsible for the control or management of the exhibition facility are required to give information or render assistance that may be necessary to carry out the search etc.<sup>32</sup>
- **Effective Legislation Would Ensure Appropriate Presumptions of Subsistence and Ownership:** Where a copyrighted work is involved in the suspected offense, appropriate presumptions of subsistence<sup>33</sup> and ownership<sup>34</sup> of copyright should be in place. In the case either subsistence or ownership issues are placed into issue by a defendant, an affidavit by the right holder should create prima facie evidence which can only be rebutted by proof to the contrary.<sup>35</sup>
- **Effective Legislation Would Ensure Destruction or Delivery Up of All Copies of Materials Illegally Camcorded as well as Materials and Implements Related Thereto:** The current draft contains criminal remedies but no forfeiture, destruction, or delivery up remedy. It must be ensured that a court before which a person is charged with an offense for illegal camcording may order that any unauthorized copy of audiovisual material and any audiovisual recording devices or other equipment in the possession of the alleged offender be forfeited, delivered up to the right holder (or its exclusive licensee), or destroyed.
- **Effective Legislation Must Not Create Broad Exceptions:** As the prohibition on unauthorized use or possession of an audiovisual recording device is set out as a separate offense, it is inappropriate to craft new copyright exceptions within the statutory framework (indeed, countries having legislated on this issue have

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<sup>32</sup>To the extent the operator of the exhibition facility is required to detain persons suspected of carrying out an offense, it may be desirable to draft an immunity clause as to such operators. Again, model draft text has been provided on several occasions.

<sup>33</sup>For example, the legislation should provide, “in the case of copyright materials, copyright shall be presumed to subsist in the work if the accused person does not put in issue the question whether copyright subsists therein, but where the accused person puts such question in issue without adequate evidence or does not satisfy the court that he does so in good faith, the presumption as to the subsistence of copyright shall nonetheless apply.”

<sup>34</sup>For example, the legislation should provide, “in the case of copyright materials, where the name of a person appears on copies of the work as made available to the public in such a way as to imply that the person was the maker thereof and, in the case of a person other than a body corporate, that name was his true name or a name by which he was commonly known, that person shall be presumed, unless the contrary is established, to be the maker and copyright owner thereof.”

<sup>35</sup>For example, the legislation should provide, “where the accused person puts in issue the question of whether copyright subsists in the work or the ownership of the copyright, an affidavit made on behalf of the copyright owner in which he makes assertions of facts relevant to showing: i) that copyright subsists in the work or other subject matter; and/or ii) that he is the owner of the copyright, shall be admitted in evidence and shall be prima facie proof of the matters stated therein until the contrary is proved.”

viewed it as critical to close loopholes, e.g., with respect to private copying, rather than open new exceptions). Unfortunately, the draft proposes an extremely broad exception for the “reproduction or adaptation for the benefit of visually impaired people, hearing impaired people, intellectually impaired people or other types of impaired people as prescribed in [a] royal decree,” as long as such reproduction or adaptation is not done for “profit making.” This proposed exception does not belong in this specialized statute, and as written and applied to copyright materials, is overly broad.

**Organized Crime Prevention Legislation Set to Enter Into Force:** IIPA is very pleased that amendments to the Money Laundering Prevention and Suppression Act B.E 2542 (MLPSA) have been passed by Parliament and only await Royal assent.<sup>36</sup> The new law will add another tool to address significant piracy concerns, including the possibility of freezing assets related to piracy (if the proceeds of piracy exceed Bt500,000). The Director General of DSI, Mr. Tharit Pengdit, supported pressing for these amendments to the MLPSA, and we note he has indicated that confiscation of proceeds derived from piracy is an effective measure to tackle piracy. The government reportedly has called a meeting with owners of rental spaces both at department stores and state-owned buildings as well as with Internet service providers, asking them for cooperation to help tackle IP violations.<sup>37</sup> These are all positive steps. The Royal Thai government should address the issue of organized criminal syndicate involvement in piracy and counterfeiting operations through strict implementation of this anti-organized crime legislation.

**Copyright Modernization Appears to Be Moving Forward:** IIPA is pleased that the Royal Thai government has proceeded to draft legislation to modernize the Copyright Act, B.E.2537 (1994). IIPA has reviewed what appears to be the latest draft which has been approved by the Cabinet. We make the following non-exhaustive and preliminary observations on this draft, and hope that changes can be made consistent with these comments.<sup>38</sup>

- **Absence of Landlord Liability Provision:** A landlord liability provision outlawing one who “provides physical or digital spaces for infringing activities” is no longer included in the Draft as it had been in the March 2010 document. In 2011, DIP was apparently informed by the Thai Trade Representative that the provision was “redundant with the existing contributory offense of the Criminal Code” and it has never reappeared. 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. The Royal Thai government, in its February 2012 submission to USTR, indicated that the Office of the Attorney General had concluded that “criminal prosecution is possible if there is enough evidence of the landlords supporting the wrongdoing.”<sup>39</sup> The report indicated DIP would be working alongside the Royal Thai Police and DSI to bring an appropriate test case in a place where “tenants are large-scale infringers, and offences are committed repeatedly to prove negligence and illicit facilitation on the part of the landlords.”<sup>40</sup> Such a test case would be extremely helpful, but should not ultimately 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. The original landlord liability provision should be re-added to the copyright law amendment prior to passage. We are pleased that DIP has indicated it would continue to revisit the issue in 2012, and hopes for swift progress in 2013 toward a workable solution.
- **Technological Protection Measures Provision May Need More Detailed Treatment:** IIPA is pleased that the Draft contains measures to outlaw the circumvention of TPMs, which are key enablers of new legitimate business models for content distribution in the digital and online environments. The Draft unfortunately falls short

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<sup>36</sup> Nont Horayangura and Say Sujitaya, *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).

<sup>37</sup> *Ministry to Seize Assets of IP Flouters*, Bangkok Post, January 29, 2013, at <http://www.bangkokpost.com/business/economics/333099/ministry-to-seize-assets-of-ip-flouters>.

<sup>38</sup> We understand there remains a proposal to amend Section 66 of the Act. If this is done, BSA urges that enterprise end-user software piracy should remain as a compoundable offense or be carved out from the category of offenses considered non-compoundable.

<sup>39</sup> See *Thailand's Implementation on Intellectual Property Rights (February 2011-2012)*, *supra* note 20, para. 3.2.2.

<sup>40</sup> *Id.* The Royal Thai government has also indicated that “cooperation between DIP and the Excise Department and Department of Business Development to monitor the balance sheets and tax records of suspect landlords will be continued to put extra pressure on them.”

of meeting the requirements of the WCT and WPPT in several critical ways. The following are some non-exhaustive and preliminary comments based on a first review of the Draft:

- **Coverage of Access Controls:** It appears the drafters have covered access controls in the definition of “technological protection measures” in Draft Section 3, but then outlaws in Draft Section 53/4 circumvention only “knowing that such act may induce or cause the infringement of copyright or performer’s rights.” The phrase **“or may result in unauthorized access to a work or object of related rights”** should be added. Otherwise the intention of the drafters to cover access controls in the definition in Draft Section 3 will have been for naught.
- **Coverage of All Copy Controls:** By only mentioning “technology designed to prevent the reproduction” in the definition of TPM, the Draft may be missing out on coverage of other important exclusive rights. TPMs should also include those that protect any copyright or related right, not just “reproduction.” Also, while the term “technology” may cover all devices and components, there may be concerns about the word “designed” since the TPM should be defined based on its performance (i.e., whether it controls access or whether it protects copyright or related rights), not how it was designed. We suggest altering the wording from “technology designed to prevent the reproduction, or to control an access” to **“technology, device, or component that protects any copyright or related right designed to prevent the reproduction, or to control access.”**
- **Coverage of Trafficking in Circumvention Devices/Services:** Draft Section 3 indicates, “avoidance of technological protection measures’ is defined as an act in any manner whatsoever which makes the technological protection measures unproductive.” This definition may be broad enough to encompass trafficking, but should be made more explicit in Draft Section 53/4. As of now, the Draft merely outlaws “avoidance” of TPMs or “a provision of service causing an avoidance of” TPMs (coverage of services is quite positive). Preferably, the Draft Section would also outlaw anyone who “manufactures, imports, exports, distributes, offers to the public, provides, or otherwise traffics in devices, products, or components which 1) are promoted, advertised or marketed for the purpose of circumvention, or 2) have only a limited commercially significant purpose or use other than to circumvent, or 3) are primarily designed, produced, adapted, or performed for the purpose of enabling or facilitating the circumvention of a TPM.”
- **Avoidance of Broad Exceptions to the Prohibition on Circumvention:** While some of the enumerated exceptions in Draft Section 53/5 may be acceptably narrow, in order to preserve the adequacy and effectiveness of protection, some need to be deleted or reworked. For example, Draft Section 53/5(1) would be overly broad on its face since it would allow circumvention for any exception to copyright under the law. It is axiomatic that to allow circumvention for any exception would render protection against unlawful circumvention ineffective. The exception in Draft Section 53/5(7) should also undergo further scrutiny, since it seems overly broad to allow circumvention for “an act by any educational institutes, archives, libraries or public sound and video broadcasting organizations” as long as it is not for profit and the work is not otherwise made available. This exception is overly broad.
- **Service Provider Liability Provisions:** Draft Section 32/3 provides a rudimentary and ultimately unsatisfactory approach to the issue of addressing online infringements, including in both the hosted and non-hosted environments, and fostering greater responsibility and cooperation among Internet service providers (ISPs). According to the Draft, rather than a direct notice and takedown approach for the hosted environment, Draft Section 32/3 provides, “Where there is a reasonable ground to believe that there is an infringement of copyright in the computer system of a service provider, the owner of copyright may file a petition to the court in order that the court orders the service provider to suspend such infringement of copyright.” As such, to “suspend such infringement” a court order must be obtained. While “service provider” seems to be broadly defined, the phrase “in the computer system” is not, so there is at least some ambiguity with respect to whether all hosted and non-hosted infringements would be covered. However, the major problem with the formulation in the Draft is that it does not appear to foster any kind of responsibility or cooperation of the ISP. The ISP, rather than being in a position of liability if it knows or has constructive knowledge of infringing activity occurring through the use of its

services, can, under the Draft's formulation, simply wait for a court order. The level of cooperation IIPA members now experience in Thailand from ISPs under the current legal structure is not perfect, but members suspect that virtually all cooperation will cease if this Draft is enacted as drafted. The drafters should go back to the drawing board and consider approaches that will foster cooperation (such as traditional "notice and takedown" in the hosted environment) and fair and effective procedures to deal with repeat infringers and non-hosted environment infringements, including addressing infringing websites that operate in Thailand (regardless of where those websites' servers are located). In addition, the drafters would be wise to heed the advice of DIP officials who have espoused a much more effective and commonsense approach through a simple amendment to the Computer Crime Law, as discussed immediately below.

- **Computer Crime Law:** The Electronic Transactions Development Agency (ETDA), Ministry of Information and Communication Technology (MICT) is reportedly drafting amendments to the Computer Crime Act. Intellectual property infringement should be included as an offense under the law, as DIP has supported. As DIP has indicated, an amendment to Article 14(3) of the Computer Crime Act to include all IP online crimes would "enable blocking or shutting down websites selling IP infringing goods, publicizing copyright infringement content or facilitating copying and sharing of copyrighted works." Further, DIP notes, "The ISPs will also be able to block internet access to the domains of infringing websites."<sup>41</sup> 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.
- **Other Aspects of Modern Copyright Law Needed:** The Draft does not currently, but should, 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"; and 2) an amendment of the definition of "reproduction" to unambiguously cover temporary reproductions. IIPA hopes for swift passage of an adequate bill and would be interested in reviewing the latest draft.
- **Customs Law:** Draft amendments to the Customs Act have been prepared to empower Royal Thai Customs to seize transshipments containing pirated goods. This would be very helpful. As of February 2012, the draft Bill reportedly had been endorsed in principle by the Cabinet and is being deliberated by the State Council before being resubmitted to the Cabinet for approval.<sup>42</sup>
- **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 Copyright Act, which provides an exception to copyright protection which has been interpreted to allow wholesale copying of academic materials. Thailand should take steps to narrow the relevant provisions to ensure compliance with international norms. DIP has issued three 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

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<sup>41</sup> See *Thailand's Implementation on Intellectual Property Rights (February 2011-2012)*, supra note 20, para. 3.2.3.

<sup>42</sup> *Id.* para. 3.2.4.

defendant's activities, photocopying books and producing unauthorized compilations of excerpts for commercial purpose, did not qualify as exempt acts under Section 32.

**Remaining Problems with the Optical Disc Manufacture Act:** IIPA has previously analyzed the Optical Disc Manufacture Act<sup>43</sup> which went into effect on August 29, 2005, and specifically offered changes to improve the law. 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 continues to 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 Act;<sup>44</sup> 2) the Act 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 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 Act should provide for an automatic permit for export of discs and import/export or machines, stampers/masters and polycarbonate; 4) the Act 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 Act 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) potentially imposes quotas and potentially onerous censorship and ratings provisions. Section 9(5) allows the Film Board to establish a ratio between the number of local and foreign films, film/screen time quotas, at a time when there were 766 screens as of 2012 in Thailand. 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 requirements on films, audiovisual products, music used for karaoke, and videogames. The concerns over this ratings and censorship regime include: 1) the time frame for obtaining ratings or censorship approval, which is too long (15 days), allowing pirates (who of course do not adhere to the law's requirements) to gain a head start; 2) the costs associated with rating or censorship, again, giving pirates an additional cost advantage in the market; 3) the severe consequences 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.

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<sup>43</sup>Act of the Production of OD Products, B.E. 2548 (2005, effective August 29, 2005).

<sup>44</sup>By requiring an application for and affixation of a code to all legitimate discs, Thailand may have inadvertently created a formality that violates Thailand's international obligations. This kind of copyright owners' code application process is a flaw that could, if it results in interference with the exercise of copyright, call into question compliance with the Berne Convention's "no formality" principle. The industries find the code burdensome and problematic and call for its deletion from the law.

**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.**

**Television Advertising Restrictions:** Advertising is now permitted under the Act on Broadcasting and Television Operation Business, enacted in 2008, but is limited to a daily average of five minutes per hour for each channel, or a quota of six minutes in any single hour.

## **TRAINING AND PUBLIC AWARENESS**

The copyright industries continued steadfastly supporting the public awareness and outreach activities of the Royal Thai government, while also engaging in critical trainings to seek more effective protection and enforcement of their rights. The following are among the trainings and public awareness activities, many of which were organized by the Royal Thai government, but in which industry participated, as well as industry trainings:

- A series of seminars entitled “Intellectual Property Infringement Suppression in Digital Era”: 1) January 26, 2012, organized by DIP (TECA was invited to speak in this seminar to educate police officers of the importance of intellectual property protection as well as to apprise them of the current situation of piracy; there were around 200 Inspectors and Sub-Inspectors from the Central Investigation Police Bureau); and 2) August 10, 2012, organized by DIP (a similar training for around 200 Inspectors and Sub-Inspectors from Provincial Police Region 5, held in Chiang-Mai Province).
- A series of seminars entitled Campaign “Stop Piracy – Buy Original Now”: January 30, 2012, organized by DIP (DIP aimed to persuade Thai buyers to support real products; DIP also announced to the public its appointment of IP Ambassador, Mr. Arak Amornsupsiri); and 2) June 6-7, 2012, organized by DIP (held at Park@Siam, Chulalongkorn University; “Teenager’s DNA Changing: stop buying fake products” was the theme of this event. DIP organized the event to persuade college students and young people to support real products and say no to fakes, as well as educate the crowd about the ill effects of IP piracy. During the event, there were many activities which attracted students and allow them to show their creative talent); 3) June 15-16, 2012, organized by DIP (held for two days at Lan Hor Pra, Saun Sunandha Rajabhat University).
- A series of destruction ceremonies: 1) March 29, 2012, organized by DIP in cooperation with the Royal Thai Police, Customs, DSI and right owners (held in Phuket Municipality; 79,524 pieces from various kinds of counterfeit seizures ranging from clothes, pirated discs, leather goods, and fake watches were destroyed); and 2) September 7, 2012, organized by DIP, TCSD, Customs, DSI and right owners (Bangkok event at which around 1,134,843 counterfeits and pirated goods weighing approximately 90 tons were destroyed).
- A series of seminars entitled “The Compromising Dispute Resolution”: 1) April 23, 2012, organized by DIP (held at Khon Kaen Province, TECA was invited to be a speaker by DIP, to discuss alternative dispute resolution for parties to resolve disputes without litigating by using governmental officials of DIP as mediators); and 2) May 14, 2012, organized by DIP (held at Phitsanulok Province).
- World IP Day 2012, April 26, 2012, organized by DIP (celebrated by a number of activities run by private and governmental organizations, focusing on “Visionary Innovators”).
- Music Video Making Competition, also held April 26, 2012, and organized by TECA in cooperation with the National Federation of Thai Film Associations, MPA (Thailand), and DIP (competition was open to targeted students of all universities in Thailand.)
- IP Fair 2012, May 4-6, 2012, organized by DIP (held annually to promote intellectual property awareness, and expected to draw 100,000 people for the three day fair).
- A series of seminars entitled “How to Play International Music Legally”: 1) June 25, 2012, organized by DIP, TECA, and MPC Music (DIP joined with MPC and TECA to hold a half-day seminar at Grand Sole Hotel, Pattaya, to give attendees information about the copyright law and general criminal procedures as well as alert them as to

how to defend themselves from harassment; there were 50 attendees from pubs, bars, karaoke establishments, and restaurant operators in Pattaya); 2) July 9, 2012, organized by DIP, TECA, and MPC Music (held at the Empress Hotels, Chiangmai, for 100 attendees from pubs, bars, karaoke establishments, and restaurant operators in Chiang-Mai); 3) August 6, 2012, organized by DIP, TECA, and MPC Music (held at the Blue Ocean Resort Patong Hotel, Phuket, for 80-90 attendees from pubs, bars, karaoke establishments, and restaurant operators in Phuket); 4) September 3, 2012, organized by DIP, TECA, and MPC Music (held at the City Beach Resort Hotel, Hua Hin, Prachuabkhirikhan, for 80-90 attendees from pubs, bars, karaoke establishments, and restaurant operators in Hua Hin).

- Seminar on “Developing Your Business with IPRs,” November 16, 2012, organized by DIP and the European-ASEAN Business Centre: EABC (to foster a high level dialogue with the Thai authorities on how European businesses can contribute toward improving the trade and investment climate in Thailand, to promote and raise awareness on the importance of IPR protection for business success among targeted European and Thai participants; TECA was invited to be a speaker by DIP, and there were around 80 participants attending this seminar).
- “Keep It Real” Anti-piracy Campaign, in which the U.S. Embassy cooperated on an awareness campaign with DIP, TECA and MPA; “Keep It Real” was the theme of this campaign, aimed at directing messaging to Thai youth and foreigners, namely, that: 1) digital piracy hurts Thai artists (famous Thai musicians and actors discussed this); 2) digital piracy damages creativity in Thailand, and 3) digital piracy is unfashionable.

The local Motion Picture Association (MPA Thailand) also engaged in educational outreach to both government and industry representatives during 2012. For example, MPA conducted Internet investigation trainings for DSI, the Cyber Crime police, ECD, and DIP. MPA Thailand also conducted “Make A Difference” trainings on anti-camcording for Major, SF Cinemas, Thana, and Coliseum theatres in the Northern and Southern part of Thailand.

## **GENERALIZED SYSTEM OF PREFERENCES**

Thailand enjoys preferential trade benefits under the Generalized System of Preferences trade program. Among the criteria the President must take into account in determining whether a country should continue to be designated as a GSP beneficiary country are “the extent to which such country is providing adequate and effective protection of intellectual property rights,” and “the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets ... of such country.” 19 USC 2462(c)(4) and (5). In 2011, more than US\$3.7 billion worth of Thailand’s goods entered the U.S. under the duty-free GSP code, accounting for almost 15.1% of its total imports to the U.S. In the first eleven months of 2012, more than US\$3.4 billion of Thailand’s exports to the U.S., or more than 14.4% of its total exports to the U.S., received duty-free treatment under the GSP code. The Royal Thai government needs to continue to endeavor to meet the adequate and effective test under the statute to remain eligible to receive favorable treatment under the GSP program.

# TURKEY

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

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

**Executive Summary:** The copyright situation in Turkey is evolving, with the upcoming copyright bill being rumored to include a number of proposals to improve copyright enforcement online. Although no official draft copyright bill has been published yet, the government has consulted with local stakeholders and a draft September/October proposal raises hopes that improvements are coming to Turkey, particularly in terms of addressing growing online piracy. Yet, some concerns remain with interim proposals which are discussed below; as an EU candidate country, Turkey is expected to converge its legislation with EU standards. In addition, piracy levels remain uncomfortably high for the publishing and software industries in particular. Piracy of published materials appears out of control with the Ministries of Justice and Education actually hampering efforts to stamp out book piracy rather than helping uphold the laws. Enforcement against book piracy waned, with serious problems including lack of enforcement actions and even threats by notorious pirates against local industry trying to protect publishers' rights. The software piracy rate remains high (62% in 2011) and has dropped only a small amount over the past few years, with unlicensed software still widespread among business enterprises. At the same time, considerable effort has been made by prosecutors in dealing with infringing websites, although more targeted enforcement tools, such as a notice and takedown system and measures to address decentralized forms of piracy, need to be added. The whole system is further weakened by burdensome court processes, long delays in adjudication of cases, and recidivism.

### PRIORITY ACTIONS REQUESTED IN 2013

#### Legislation

- Swiftly pass legislation to amend Law No. 5846 on Intellectual and Artistic Works, in particular the provisions regarding Internet service provider (ISP) cooperation, taking into account comments and concerns noted in this submission.
- 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 enterprises.

#### Enforcement

- 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.
- Take significant raiding actions against illegal commercial photocopying and organized pirate printing of books.
- Take significant steps to legalize large- and medium-sized businesses engaged in end-user software piracy.
- Ensure that Turkish government agencies, employees, contractors and grantees use only licensed software, including implementation of Circular No. 2008/17 (Prime Ministry Circular on Legalization of Software Use in Public Entities), and take an active role in driving local education, awareness and enforcement activities.
- Improve coordination and cooperation between authorities, police, judiciary and anti-piracy commissions in cities other than Istanbul, Ankara and Izmir.
- 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.

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<sup>1</sup>For more details on Turkey's Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2013SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.



- Increase the number of specialized IP courts throughout Turkey, e.g., especially outside Ankara, Istanbul, and Izmir, 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., requiring proof of title), and rejection of search warrant requests due to unreasonably high evidentiary requirements for probable cause.
- Improve Customs' capacity, since Turkey is used as a gateway to transport counterfeit and pirated goods to Europe.

## **COPYRIGHT LAW AND RELATED ISSUES**

**Draft Amendments to Copyright Law:** Law No. 5846, Law on Intellectual and Artistic Works 1951 (amended in 1983, 1995, 2001, 2004, 2008)<sup>2</sup> provides basic copyright protection in Turkey. The Turkish government has been preparing draft amendments to the Law for many years but no draft has been officially published since April 2010. Stakeholders were able to obtain access to an interim draft in October 2012, although they understand there may be yet a further draft. The draft amendment IIPA is aware of provides many positive features.<sup>3</sup> Among the positive features of that draft are strong measures related to provisional measures, strong measures on obtaining information about infringements, infringers, and those involved with the infringement, including penalties for those not complying with an informational order, and *sui generis* database protection, breaches of which are subject to criminal penalties. However, IIPA remains concerned about a number of important provisions in the draft. For example, IIPA has recommended that 1) the Law 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 Law prior to the 2008 amendment; and 2) confirm that copying, distributing, or unlicensed use of all kinds of copyright materials can be considered a crime regardless of whether the defendant is proved to have had a commercial purpose. IIPA further points out generally that final legislation should achieve the following:

- **Protect Technological Protection Measures (TPMs):** Amendments should ensure that protection of TPMs (a welcome addition to the Law, since Turkey is already a member of the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT)), meet the requirements of those treaties, *inter alia*, by:
  - defining TPMs to include both access controls and copy controls (we understand the drafters intend to cover both, but this should be confirmed in the final drafting);
  - covering the act of circumvention of a TPM, the trafficking in circumvention technologies, devices, or components, or the provision of circumvention services;
  - providing for both civil and criminal remedies for violations involving circumvention of TPMs; and
  - ensuring that exceptions to the prohibition on circumvention of TPMs are narrowly tailored to preserve the adequacy and effectiveness of protection.

In each of these areas, interim drafting indicated some potential problems, some more serious than others, that need to be avoided as drafting proceeds toward a final bill.

- **Foster Effective Enforcement Against Online Infringements:** Although no text has been officially published yet, an interim draft released to local stakeholders does include a number of proposals to provide a framework for protection of copyright on the Internet. IIPA applauds the drafters for this attempt to give meaningful protection to copyright online and seeking to address both hosted and non-hosted infringements.<sup>4</sup> It is important

<sup>2</sup>Last amended by Law No. 5728 (2008).

<sup>3</sup>Among the positive features of the Draft are strong measures related to provisional measures, strong measures on obtaining information about infringements, infringers, and those involved with the infringement, including penalties for those not complying with an informational order, and *sui generis* database protection, breaches of which are subject to criminal penalties.

<sup>4</sup>IIPA understands that positive elements would include: 1) the possibility of secondary liability against an owner of a website that knows or has been given notice about infringement, had technical capabilities of stopping such an infringement, and fails to terminate the infringement, and 2) the possibility of directly applying to a Public Prosecutor for removal of infringing activity without a warning notice if the content provider's or the hosting provider's electronic contact addresses are not provided in the Internet medium or all of the activities of the related website are related with the infringement of the rights afforded by this law or in case of inconvenience that may result from any delay.

to ensure that any individual, and not just a collecting society, can avail themselves of the remedy with regard to online infringements. It is also important to ensure that:

- non-hosted infringements are included in coverage, such as one-click hosting sites that enable people to upload, download and access (through links) massive amounts of infringing materials, streaming sites, or deeplinking sites;
  - the time frames for removing content or disabling access to infringement must not be too long to address, e.g., pre-release piracy. The obligation to act and remove infringing content should always require the provider to act as soon as possible in the circumstances. In this regard it is also important to note that regarding takedowns of infringing content upon notification, a court order (or other formality) should not be required;<sup>5</sup> and
  - the obligation to halt online infringements is triggered when the provider knows or has been given notice, or is aware of facts or circumstances from which the infringement is apparent.
- **Avoid Serious Concerns In Proposals Regarding Copyright Collective Societies (CCS):** The Turkish government is considering extensive proposals regarding the collective management of rights. IIPA strongly urges the drafters to keep the following goals in mind to achieve the best possible outcomes for collective management in Turkey:
    - remove restrictions on the ability of foreign music producers, or their foreign collective management organizations, to become full members of a collective management organization in Turkey, and ensure fair and proportionate voting rights and distribution of income for foreigners;
    - avoid mandatory single-window licensing or “joint” collective solutions and instead rely on voluntary cooperation between the right holders;
    - provide that a copyright management organization (CMO) should represent a single category of rights to avoid conflicts of interest between the different categories of right holders, while not precluding the possibility of voluntary cooperation in a number of areas, including in particular, collections;
    - ensure that the principles of good governance, fair participation, transparency, and accountability apply to the operation of any CMO, and in particular, to ensure that such an entity is run in a professional and effective manner, and any cost savings from voluntary joint administrative operations should benefit right holders and users;
    - ensure fair and proportionate voting power of the various collective management organizations voluntarily participating in any single-window or joint licensing entity;
    - ensure income is distributed according to international industry practices; and
    - improve mechanisms for the enforcement of collectively managed rights, by addressing the obligations of users (licensees) of collectively managed rights, including: a) putting in place effective dispute resolution mechanisms, which would encourage timely resolution of tariff disagreements; and b) putting in place an effective and dissuasive system of fines for unlicensed uses.
  - **Avoid Compulsory Remuneration Schemes:** IIPA understands the drafters have been considering a provision that authors or performers having assigned certain of their rights to a producer of phonograms or the film producer shall retain a right of remuneration which cannot be “waived.” These rights of remuneration would impinge on the ability to freely contract (in phonograms and audiovisual works in the case of Draft Article 23), and could upset longstanding contractual and commercial relationships.
  - **Ensure Personal Copy/Private Copy Levy Inures to Benefit of Right Holders:** IIPA has long noted that since the government of Turkey has chosen to implement a private copy levy, it is imperative that the levies are in fact collected and distributed to relevant right holders in full. It has been a longstanding concern of the copyright industries that private copy levies have been collected by the government, but have been retained and used as public funds under the authority of the Ministry of Culture and Tourism, rather than distributed in full to the

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<sup>5</sup>In contrast to this, disabling an entire website through a disabling injunction would usually require a specific legal basis.

relevant right holders (i.e., those whose copyrights were subject to the private copy exception for which levies were collected). IIPA understands the interim bill includes a major improvement, i.e., a recognition that private copy income should be passed on to right holders. However, it remains unclear whether the bill will guarantee full income distribution. As these levies are provided for as compensation for certain private uses of copyright, the full income from those levies ought to be distributed to the relevant right holders. IIPA encourages the Council of Ministers to determine that the greatest percentage possible of the funds collected through the private copy levy should be distributed to rights holders.

- **Avoid Weakening Protection Against Unauthorized Imports of Works:** The current law provides an importation right, i.e., against not only piratical imports but also against parallel imports. The government is apparently considering removing this right, thereby weakening protection. Controlling parallel imports assists in the administration of commercial relationships in various territories, permits price differentiation (which helps developing countries enjoy greater availability and accessibility to creative products), and is an important counter-measure to piracy since piratical imports often mask as, or are often hidden in shipments of, parallel imports.
- **Retain Banderole System for Physical Piracy Enforcement:** While hard goods piracy is somewhat waning with the growth of the online/digital marketplace, the banderole requirement, which is not usually favored by IIPA,<sup>6</sup> has actually helped in Turkey, in large part due to the fact that enforcement by the Police and Inspection Committee members in Turkey has occurred against street piracy on an *ex officio* basis to address product in violation. In 2012, the General Directorate of Security reported seizures of 2.29 million traditional hard goods piracy pieces without banderoles. Industry has noted in recent years 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.<sup>7</sup> Indications are that the system will be retained in the amendments.
- **Avoid Overly Broad Exceptions and Limitations or Compulsory Licenses:** IIPA understands that the Turkish government is considering a number of changes to the law which would either expand exceptions and limitations in certain areas or would impose new compulsory licenses limiting right holders' exclusivity. The government is apparently considering the following changes to exceptions/new exceptions: 1) expansion of the exception for distance learning;<sup>8</sup> 2) a proposed digital archive exception;<sup>9</sup> 3) an exception for ephemeral

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<sup>6</sup>IIPA has noted in past reports some concerns about the integrity of the system. Over 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.

<sup>7</sup>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."

<sup>8</sup>Apparently, interim drafts revealed the distance learning provision in Turkish law would be altered by removing the phrase "face-to-face" thereby allowing published works to be freely performed for "the purpose of education and scientific research" as long as it is done "without pursuing any direct or indirect commercial purpose." In order to comply with its international obligations under the Berne Convention and TRIPS, this exception must be re-drafted to expressly include the second and third parts of the Berne Convention/TRIPS Article 13 three-step test, namely that the exception only applies, provided, that in no case shall the use conflict with a normal exploitation of the published work or unreasonably prejudice the legitimate interests of the right holder.

<sup>9</sup>Apparently, interim drafts reveal a digital archive exception which would provide for free reproduction of any work "kept in publicly accessible libraries, museums, educational institutions and public archives" by converting them to digital files, as long as it is done for archiving purposes and not "pursuing any direct or indirect economic or commercial purposes." The exception would also allow the free "mak[ing] available to the public the digital archives produced as such for research purposes by means of terminals dedicated for archival use on the premises of the publicly accessible libraries or educational establishments and public archival buildings." Such a provision must be very carefully weighed or it may run afoul of Turkey's international obligations. It is well recognized that current exceptions (such as those in Section 108 of the U.S. Copyright Act as to libraries and archives) may be in need of modernization to address the digital age and expectations of users for access to digitized materials. Yet, there are complex issues associated with making such dramatic changes, such as 1) eligibility criteria to avail oneself of the exception, 2) what kind of works can be subject to the exception, i.e., limited to text-based works, 3) limitations on the number of copies, 4) whether archiving should be limited to unpublished works, or if not, whether published works must be "at risk" to be eligible for an archival copy, 5) liability principles if archived digitized copies are further reproduced without authorization, and 6) the application of technological protection measures. The Turkish government is encouraged to consult with experts and consider carefully the re-crafting of this provision to ensure that, while addressing the intended purpose of the provision to meet the legitimate needs of archives, that Turkey also meets its international obligations, e.g., under the Berne Convention and the TRIPS Agreement.

recordings;<sup>10</sup> and 4) a database use exception.<sup>11</sup> The government is also considering certain compulsory remuneration provisions such as: 1) a “partial reproduction” compulsory license;<sup>12</sup> 2) a compulsory lending remuneration;<sup>13</sup> and 3) an orphan works provision.<sup>14</sup> IIPA also encourages the Turkish government to address the harm that is befalling academic publishers due to the overly broad language in Article 34 of the current Law. Publishers report that universities interpret Article 34 to allow free copying of copyrighted texts, which has reduced and will continue to reduce the size of the academic textbook market in Turkey for local and foreign publishers. IIPA recognizes that Article 34 includes language similar to the three-step test to try to ensure that the legitimate interests of right holders are not negatively impacted. Specifically, the current language states that “this freedom may not be used in a way which would prejudice the legitimate interests of the author without good reason.” This is not the appropriate standard under Berne/TRIPS Article 13 and should be changed to ensure that “this freedom may not be used in a way which would prejudice the legitimate interests of the rights holder or conflict with the normal exploitation of the work.” Moreover, the exception in general should be narrowed to comport with the EU Directive 2001-29 Article 5(3) allowing “use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author’s name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved.”

- **Avoid Prohibited Formality Through Recordal and Registration Requirement:** IIPA understands that the Turkish government is considering a provision to mandate recordal and registration for the purpose of proving ownership and tracking the authority to benefit from financial rights. IIPA strongly opposes a mandatory recordal and registration system, and notes that it must not deny copyright protection such that it would amount to a prohibited formality under the Berne Convention and the TRIPS Agreement.
- **Ensure No Hierarchy of Rights in Works/Related Rights:** IIPA understands there is a provision which could be misinterpreted to give authors an advantage over owners of related rights. The government should ensure that the rights of authors and the rights of producers of phonograms and performers coexist independently, consistent with the Rome Convention and WPPT Article 1.

## **PIRACY UPDATES IN TURKEY**

**Enterprise End-User Software Piracy, Hard Disk Loading, and Government Legalization:** The software piracy rate in Turkey was 62% in 2011, representing a commercial value of unlicensed software use of \$526 million.<sup>15</sup>

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<sup>10</sup>IIPA understands the interim draft includes an “ephemeral” fixation exception, but that it is not limited to a single copy, and there is no destruction provision (within six months) if the program is not “of an exceptional documentary character.”

<sup>11</sup>From what IIPA has heard about the proposed database exception, it aims to respect the rights of copyright owners by ensuring that the exception applies only to appropriate uses of databases by legitimate users. IIPA encourages the Turkish government to make sure that any relevant terms such as “legitimate user,” “any of the acts required,” and “copy of a database” are clearly defined to ensure that the exception is appropriately narrow and provides guidance to legitimate database users as to what exactly the exception allows.

<sup>12</sup>Publishers are concerned about the possibility of a “partial reproduction” exception or compulsory license provision, and want to ensure that any person or entity that photocopies or otherwise creates a partial reproduction of a work must pay equitable remuneration, regardless of whether the purpose is for direct, indirect, or no economic gain.

<sup>13</sup>IIPA is concerned by apparent proposals to provide for the free lending of the original or reproduced copies of a work by publicly accessible enterprises as long as equitable remuneration is paid. In order to protect against further unauthorized electronic distribution of copyrighted works, this lending provision should only be applicable to hard copies, in the case of reproductions and the originals referenced in the provision. The Turkish government must ensure it narrowly defines “publicly accessible enterprises” so that its law can remain consistent with EU discipline in this area.

<sup>14</sup>IIPA is generally supportive of the Turkish government addressing the issue of orphan works in relation to Turkish works, and notes that whatever the government decides to do, it should not be out of step with the EU Orphan Works Directive. There is some concern that the Turkish government is considering allowing the applicability of the provision if the user cannot “reach” the author. If the author is known but cannot be reached, the provision should not apply.

<sup>15</sup>BSA | The Software Alliance’s 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Turkey was 62%, representing a commercial value of unlicensed software of US\$526 million, a significant increase over the previous year. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers

The rate of software piracy has only dropped modestly over the past few years (from 65% to 62% from 2007 to 2011). A key concern remains the widespread use of unlicensed software by enterprise end-users. 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 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 the legislative fix in the draft amendment to the Copyright Law to outlaw violations involving the circumvention of technological protection measures (with changes noted herein) will be welcome. Reductions in 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% over four years would generate \$783 million in GDP, \$154 million in additional tax revenues and 2,180 new IT jobs. The benefits would be even greater if this reduction was achieved in two years, which would yield over \$1 billion in GDP and \$205 million in additional tax revenues.<sup>16</sup>

IIPA welcomed the Turkish government’s issuance of the Prime Ministry’s *Circular on Legalization of Software Use in Public Entities*, No. 2008/17 (July 2008), ordering that government agencies should legalize their software use. Unfortunately, the Turkish government has not widely implemented the Circular. Some IT managers of public sector agencies have complained 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. Another issue is lack of transparency and publicly accessible data on how many resources have been allocated for legalizing software use in governmental agencies. As the Prime Ministry Circular is a high-level regulatory document, one issue raised is that it is not easy to reach each Ministry. An alternative and more effective approach has been suggested, namely, each Ministry should issue a Circular for the institutions under their authority. As an example, the Ministry of Health issued a Circular based on the Prime Ministry Circular. By implementing the Circular and legalizing all use of software in the public sector by government agencies, employees, contractors and grantees, the Turkish government can set a powerful example for businesses and consumers in Turkey.

**Internet and Mobile Piracy Rapidly and Dramatically Increases in Turkey:** Turkey has approximately 35 million Internet users as of 2012.<sup>17</sup> There were almost 19 million fixed broadband subscriptions in Turkey by the third quarter of 2012, and more than 11 million mobile Internet users.<sup>18</sup> 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.<sup>19</sup> As a result of these developments, Internet usage of copyright materials continues to displace physical product in Turkey, and Internet piracy continues to devastate right holders and hinder the development of licensed services.

Internet piracy in Turkey takes on many forms, including illegal P2P filesharing services,<sup>20</sup> cyberlockers hosting pirated content (and encouraging users or even paying them to share), BitTorrent sites (employing swarm

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or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

<sup>16</sup>BSA and IDC, *Piracy Impact Study: The Economic Benefits of Reducing Software Piracy: Turkey*, 2010, at [http://portal.bsa.org/piracyimpact2010/cps/cp\\_turkey\\_english.pdf](http://portal.bsa.org/piracyimpact2010/cps/cp_turkey_english.pdf).

<sup>17</sup>European Travel Commission, NewMedia TrendWatch, *Turkey*, December 2012, at <http://www.newmediatrendwatch.com/markets-by-country/10-europe/87-turkey>.

<sup>18</sup>International Telecommunication Union, *Fixed Broadband Subscriptions 2000-2011*, at <http://www.itu.int/ITU-D/ict/statistics/material/excel/Fixed%20broadband%202000-2011.xls>, accessed on January 10, 2013.

<sup>19</sup>YouTube use was another 8.47%. Sahin Sen, *Stunning Data on Use of Internet in Turkey*, June 21, 2011, at <http://blog.tnet.com.tr/turkiye%E2%80%99de-internet-kullanimiyla-ilgili-carpici-veriler/>.

<sup>20</sup>Turkey ranked 14th in the “Top 60 Countries Ranked By Total Unique Downloads During 2012/1Q” (1,763,755 units).

technology for faster downloads of pirate material),<sup>21</sup> 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 2012, the Entertainment Software Association (ESA) reports that Turkey placed 13th 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, continuing its unfortunate rise in the rankings from 21st in 2010 and 15th in 2011.<sup>22</sup>

**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.<sup>23</sup> 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. In 2012, publishers report that photocopying at universities has increased and photocopying at state schools is “out of control,” and that full color “print piracy” (off presses) remains a major problem. In addition, online piracy of textbooks, supplements, reference books, and trade books is a growing problem. Furthermore, there are two notorious pirate book counterfeiting operations that are very organized and conduct an estimated 90% of all piracy of foreign language books. Publishers have brought numerous cases against these two pirate operators with little success. For example, they have their own printing houses and their machines were supposed to be sealed under a court order but remain in operation.

**Retail Piracy (Optical Discs), Mobile Device Piracy, “Mod Chips”:** Physical piracy has decreased somewhat in Turkey over the years, in part due to a shift to online forms of piracy, and in part due to significant numbers of raids run and seizures in the tens of millions of pirated products by the authorities.<sup>24</sup> Past IIPA reports detailed the migration to “burned” recordable discs<sup>25</sup> 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. One recent phenomenon noted has been the increase in the sale and servicing of “mod chips” installed into videogame consoles to play illegal games.

## **ENFORCEMENT UPDATES IN TURKEY**

**Book Piracy Enforcement Efforts Disappointing:** Publishers continue to be disappointed by efforts from the Turkish government in 2012 to address their issues. As in 2011, the Turkish Publishers’ Association (PA) again conducted a number of raids (self help) and awareness raising exercises in 2012. The Turkish PA has also raised book piracy issues with the Ministry of Culture, but the Ministry has not responded to these concerns. There has been greater cooperation in recent years with the Turkish Police Force resulting in some raids against entities engaged in unauthorized photocopying activities. However, law enforcement agencies have remained reluctant to

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<sup>21</sup>According to the “Musimetric Report” of September 2012, Turkey ranked 28th in the “Top 50 Countries for Total BitTorrent Downloads During 2012/1Q Ranked by Volume” (2,568,942 units).

<sup>22</sup>ESA’s reporting on P2P activity does not take into account downloads of these titles that occur directly from hosted content, such as games found on “cyberlockers” or “one-click” hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

<sup>23</sup>Piracy concerns have been raised repeatedly by NGO’s such as YAYBIR (Publishers Copyright and Licensing Society), BASYAYBIR (Professional Union of Press and Publishers), YAYFED (Publishers Associations Federation) and individual publisher representative.

<sup>24</sup>The Turkish Government’s 2011 Special 301 Report indicates over 24 million “pirated materials” confiscated. See Republic of Turkey, Prime Ministry, Undersecretariat for Foreign Trade, General Directorate of Agreements, *Protection of Intellectual Property Rights in Turkey*, February 2011 (on file with IIPA).

<sup>25</sup>Shops have in recent years capitalized on Internet connectivity to engage in CD-R burning of content downloaded from the Internet, as well as burning compilations on-demand to CD-Rs. Illegal CD-R copies of music played at tourist hot spots, hotels, bars and clubs are sold “on the spot.” Moreover, most of the source music played in bars and discos derive from illegal copies or Internet downloads.

take actions 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, with only the occasional copyright awareness message but no serious willingness to stop piracy on campuses. Remarkably, the Ministry of Education has actively worked against publishers. For example, in 2012 the Ministry of Education banned the use of any supplementary materials in K-12 education,<sup>26</sup> especially targeting international publishers and recommended that schools purchase photocopiers to produce what they needed for students. In addition, schools usually charge students a fee for these school-made copies, resulting in students being charged more than if legitimate copies were purchased. Some limited raids have been initiated by the government to protect local language trade books, but not foreign language or academic books during their peak sales season (September/October), when international publishers generate an estimated 80% of their annual sales revenues. Additionally, there have been some reports of threats of violence against those who are trying to protect their works by undertaking raids.

**Improvement Needed to Bolster Enforcement Against Software Piracy:** The 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. 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 2012, the software industry collaborated in around 60 criminal raids against end-user commercial enterprises (not including reseller raids), based on leads, and the raids produced official evidence to be used in prosecutions. Internet piracy of software is much more difficult to detect and it is very hard to identify individual pirate users as they use techniques such as proxy servers to remain anonymous. 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 industry. 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. The criminal procedure law contains mechanisms such as suspension and postponement of convictions, and courts regularly impose suspensions, postponements, and minimum sentences (one year in prison, usually suspended), and issue judicial fines without imprisonment. The result of all these problems is recidivism.

**Internet Enforcement Efforts:** 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 on notices to take down infringing materials and effective and fair policies to address non-hosted infringements and repeat infringers, and 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); and 3) the lack of any mechanism for identifying perpetrators who often use privacy services provided by ISPs making it impossible to locate them.<sup>27</sup>

In the absence of an adequate legal framework and the necessary enforcement tools, right holders have resorted to self-help and seeking disabling of infringing materials. For example, the music industry has an Internet enforcement team which detects illegal websites and sends notices to remove illegal content, with the

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<sup>26</sup>Ministry of Education officials have denied signing the memo banning the use of supplementary materials, but a promised memo correcting the position has never been issued.

<sup>27</sup>Turkish judicial authorities assume that IP addresses of Internet users are personal data and under the protection of Section 9 of the Criminal Law. Therefore, such data cannot be shared with right holders without judicial findings even if there are clear-cut infringements of copyright. Even if right holders and/or collecting societies monitor infringements occurring on the Internet, there is no way to find out the identity of infringers without applying to judicial authorities. 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 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.

commencement of a criminal complaint if the notice does not lead to relief. In 2012, over 2,300 websites were checked and notices sent to over 900 websites. Out of these 900 sites, more than 500 websites have had illegal content removed and more than 280 websites have been disabled pursuant to Turkish Public 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 aggravated by 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.

**More Specialized Courts and Increased IP awareness in Courts of General Jurisdiction Needed:** Lack of deterrence and recidivism continue to plague the court processes in Turkey. Prison sentences are rarely issued in criminal cases (with judges being particularly lenient on first-time offenders), and most of the time such sentences are suspended. Right holders continue to report certain problems in court procedure, including delays in adjudication (of three to five years) and the lack of overall deterrence in results.<sup>28</sup> Other problems include 1) most criminal cases end in suspended sentences which encourages recidivism;<sup>29</sup> 2) many sentences are reversed on appeal which encourages recidivism; 3) preliminary court injunctions are difficult to obtain (this is a general problem experienced in Turkish courts), especially for infringement done by well-known companies (such as infringing internet users of media groups); 4) obtaining a criminal search warrant in some districts is difficult (often because search warrants are requested from the lowest level criminal courts which are not IP law specialists);<sup>30</sup> 5) in some cases the presumption of ownership is not properly applied;<sup>31</sup> 6) there remain difficulties in storing of large amounts of pirate materials with police warehouses full, onerous costs on right holders for storage, all hindering police willingness to bring more actions; 7) there remains a general lack of IP expertise and experience on the part of the judiciary and Public Prosecutors, although the music industry reports good cooperation from Public Prosecutors in a number of online music piracy cases; and 8) lack of information about international jurisprudence and legal developments. IIPA commends the Turkish government for its establishment of 23 specialized IP courts in select cities, and the establishment of a special prosecutor's bureau responsible for IPR investigations.<sup>32</sup> 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. At the same time, the IP Courts are not the problem, but rather, the courts of general jurisdiction are the most problematic part of the judiciary.

**Ensure Exclusive Rights in Sound Recordings Are Meaningful:** Currently in Turkey, those using 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. It is extremely important that right holders enjoy safeguards to proceeds, for example, users should have an obligation to pay to the collecting society either the undisputed amount or a reasonable interim rate set by the court, with the difference paid into escrow pending the dispute resolution/court

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<sup>28</sup>For 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.

<sup>29</sup>The current Copyright Law stipulates penalties ranging from one to five 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 two 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 two 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.

<sup>30</sup>In some districts, public prosecutors require search warrants from judges to approve any raid action in anticipation of a criminal case. In those districts, search warrant applications must be made to standard criminal courts (via prosecutor's offices). The criminal courts in some instances have been reluctant to grant search warrants without substantial evidence, which can only be obtained via the raid, hence, a Catch 22 situation is encountered.

<sup>31</sup>IIPA members have reported burdensome documentary requirements, such as the demand on U.S. publishers that notarized translations of original contracts between the author and publisher be produced in order to prove copyright ownership for each title, at quite substantial fees. 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.

<sup>32</sup>In 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 24.

decision.<sup>33</sup> Also, preliminary injunctions should be effectively applied to unlicensed broadcasters (some well known channels have not had voluntary agreements since 2001).

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

Turkey enjoys significant preferential trade benefits under the Generalized System of Preferences trade program. Among the criteria the President must take into account in determining whether a country should continue to be designated as a GSP beneficiary country are “the extent to which such country is providing adequate and effective protection of intellectual property rights,” and “the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets ... of such country.” 19 USC 2462(c)(4) and (5). In 2011, more than \$894 million worth of Turkish goods entered the U.S. under the duty-free GSP code, accounting for 17.25% of its imports into the U.S. In the first eleven months of 2012, almost \$1.05 billion of Turkey’s exports to the U.S., or more than 18.1% of its total exports to the U.S., received duty-free treatment under the GSP code. Turkey needs to continue to endeavor to meet the adequate and effective test under the statute to remain eligible to receive favorable treatment under the GSP program.

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<sup>33</sup>This solution is used e.g., in the German Copyright Management Law, s.11, paragraph 2.

# UNITED ARAB EMIRATES

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that the United Arab Emirates be placed back on the Watch List in 2013.<sup>1</sup>

**Executive Summary:** After many years off the Special 301 lists, the situation in the United Arab Emirates warrants placement back onto the Watch List. For many years, IIPA members experienced exemplary enforcement efforts on the part of the UAE enforcement authorities, including the Dubai Police, the Telecommunications Regulatory Authority (TRA), the Ministry of Information and Culture (MOIC) (when it was responsible for copyright), and until two years ago, the Ministry of Economy (MOE). They also received deterrent court judgments enforcement results which achieved reductions in piracy levels, making the UAE a model for the Gulf region. With an emerging digital marketplace, including legitimate digital services launching in the region (along with phone offerings such as the iPhone5), the UAE government must once again step up as a role model for the Gulf region and indeed the entire Middle East.<sup>2</sup> Great hopes now lie with the UAE government to ensure that continued progress to create a favorable environment for IPR protection can deliver economic and cultural benefits for the UAE and the Middle East region.

Unfortunately, some serious concerns must be expressed. First is the inability of the recording industry to begin collecting in the UAE the royalties they are legally entitled to collect under the UAE Copyright Law. The result of there being no established mechanism to collect is that U.S. and other right holders are losing millions of dollars per year in uncollected royalties. Piracy and counterfeiting also continue, particularly in the Dubai trading zone. Internet-based piracy and violations involving the circumvention of technological protection measures (TPMs) have grown significantly in recent years, especially after the MOE ceased instructing TRA to take enforcement action against the many notorious sites and sites geared to the UAE market. Unlicensed software use by enterprises (enterprise end-user software piracy) continues to be a problem and accounts for significant losses to the software industry. The software piracy rate is nearly 40% with a commercial value of unlicensed software of over \$200 million.<sup>3</sup> Industry experts also report that pay-TV piracy in the Middle East/North Africa region cost operators US\$500 million in revenue every year, at least some of which is attributable to the UAE.<sup>4</sup> The legal framework in the UAE is relatively sound, although MOE claims it needs changes to the law in order to resume Internet enforcement activities (through TRA), and in the amendment process, the government should take other steps to fully modernize the Law. With more content industries seeking to open or expand commercial activity in the Emirates,<sup>5</sup> it is of critical importance that all the deficiencies outlined herein be addressed with urgency.

<sup>1</sup>For more details on United Arab Emirates' Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2013SPEC301HISTORICALSUMMARY.pdf>. Previous years' reports on the UAE are not available electronically, but are on file with IIPA (and part of the public record submitted to USTR).

<sup>2</sup>Noelle Manalastas, *Apple Opens iTunes Store in Middle East, Unveils iPhone 5 Release Date*, Al Arabiya News, December 5, 2012, at <http://english.alarabiya.net/articles/2012/12/06/253621.html>.

<sup>3</sup>BSA | The Software Alliance's 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in the UAE was 37%, representing a commercial value of unlicensed software of US\$208 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA's 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

<sup>4</sup>Marie-Louise Olson, *New Copyright Laws to Curb Film and Music Pirates*, December 13, 2011, at <http://www.thenational.ae/news/uae-news/technology/new-copyright-laws-to-curb-film-and-music-pirates#ixzz2HjbyoKWD> (citing David Butorac, chief executive of OSN Network, the cable and satellite operator).

<sup>5</sup>In the past couple of years, IIPA members have shown greater interest and concern over developments in UAE. The launch of iTunes in UAE on December 14th is an important development, signaling the belief by a major music distributor that the market holds growth potential. Right holders have cemented deals with a variety of digital platforms, major artists are touring and selling out venues (e.g., Madonna, Enrique Iglesias, JLO, Katy Perry have all had sold-out tours), and the success of the Voice of Arabia has incentivized greater investment in local talent.



## **PRIORITY ACTIONS REQUESTED IN 2013**

- Have the MOE issue rules so that collecting societies can begin collecting in the UAE the royalties to which they are legally entitled under the UAE Copyright Law.
- Have the MOE once again take more proactive steps in addressing copyright violations on the Internet, including properly instructing the TRA with respect to Internet sites involved in the distribution of infringing copyright materials and circumvention tools.
- Modernize Federal Law No. 7 of 2002 Concerning Copyrights and Neighboring Rights to ensure adequate legal protections and remedies against circumvention of technological protection measures (TPMs), and the trafficking of or servicing in technologies, devices, or components principally made, promoted, or marketed to circumvent TPMs.

## **PIRACY AND ENFORCEMENT ISSUES IN UAE**

**Allow Legitimate Collection of Royalties for Uses of Phonograms:** Broadcasting and the public performance are increasingly important uses of recorded music. The types of commercial establishments that use recorded music for this purpose include radio stations, hotels, restaurants, shops, discos, bars, dance schools, airlines, etc. The UAE Copyright Law provides the relevant rights. Specifically, Article 18 of the UAE Copyright Law states that producers of phonograms enjoy rights to any exploitation (including copying, renting, broadcasting, re-broadcasting, disseminating by wire, wireless, computer or other means, or making available to the public via computer or other media) of their phonograms. Article 37 of the Law provides that anyone who engages in such exploitation without permission from the right holder infringes copyright and is made subject to criminal penalties and civil remedies.

Due to the nature of these rights in phonograms, licensing of the use of phonograms has become an increasingly important part of the overall revenue stream for performers, producers of phonograms, songwriters, composers, and music publishers throughout the world.<sup>6</sup> Section 16 of the Law enables the creation of collecting societies and provides for the undertaking of collective rights administration. Ministerial Decision No. 133 of 2004 concerning the Collective Management of Copyrights and Neighbouring Rights established the basis on which licenses permitting collective management activities would be granted by the Ministry. Based on the Law and Ministerial Decision, in 2004, the recording industry took steps to establish Emirates Music Rights Society (“EMRS”) in the UAE to serve as a collecting society. Nearly nine years later, after ongoing requests from the industry and the U.S. government, considerable efforts on the part of both to comply with numerous meeting and information requests from MOE, MOE has not yet promulgated regulations that would permit the approval of a collecting society.<sup>7</sup> This refusal to approve collecting societies has come despite many assurances from MOE (and its predecessor the Ministry of Information and Culture) that a decision was imminent. In the absence of government approval for a collecting society, there is no practical way for right holders to enforce their rights, leading to millions of dollars each year in lost revenues to U.S. and other foreign right holders.

**Internet Piracy and Lack of Responsiveness from MOE:** According to the International Telecommunications Union (ITU), Internet broadband penetration in the UAE has skyrocketed, to almost 867,000

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<sup>6</sup>Globally, the most effective, efficient and user-friendly way for right holders to license their catalogues to commercial establishments that use recorded music in the operation of their businesses is through collecting societies. For each individual right holder to license its catalogue directly to each and every user in a given territory is impossible from a practical standpoint. The same applies to individual users, for whom it would be impossible to obtain licenses for playing recorded music from all right holders involved. Therefore, it is an internationally accepted practice that collecting societies are an essential element for the efficient licensing of the relevant rights granted under national copyright laws.

<sup>7</sup>As an example, in 2008, MOE Under-Secretary Mohammed Ahmed Bin Abdul Aziz requested and received from the recording industry information on how collecting societies work in other countries. Several requests and meetings later, including a meeting in December 2008 in UAE with MOE official, Mr. Fawzi Al Jaber, who stated that his Ministry was awaiting further guidance from WIPO. We understand WIPO has offered assistance on this matter. However, more than four years later, MOE still has not acted to legalize collection in UAE.

and nearly 11% of all Internet users, more than doubling since 2006 and more than a ten-fold increase since 2003.<sup>8</sup> The TRA pegs Internet penetration in the UAE at 27.7% and broadband penetration at 11.5%.<sup>9</sup> Mobile phone penetration has long exceeded 100% and by 2011, stood at 148.6% or more than 11.7 million subscriptions throughout the Emirates.<sup>10</sup> A significantly high number (71%) of mobile users access the Internet through their mobile phones, according to a 2011 survey.<sup>11</sup>

As a result, online piracy in the UAE has proliferated, harming all the content industries.<sup>12</sup> Based on download statistics of pirated titles of Sony PS3, UAE is the second worst offender of copyright online in the Middle East, second only to Saudi Arabia. Internet piracy needs to be immediately addressed within the UAE. Hundreds of websites, mostly hosted on servers located outside the Emirates, have been brought to the attention of MOE. The websites being accessed in the UAE, making available pre-release music, movies, television content, software, games, and publications, reference books, online journals, and trade books of top publishers, include some of the most notorious online piracy sites in the world, and include sites clearly intended to market to those in the region including in the UAE.<sup>13</sup> In 2010, relying on the current UAE Copyright Law, the TRA had taken actions with respect to over 100 websites, including online piracy sites but also those making available circumvention devices for console-based videogames.<sup>14</sup> In addition, there were over 100 server addresses engaged in signal theft piracy for which TRA took action based on an MOE directive. Six criminal cases were apparently launched back in 2010.

Unfortunately, when MOE stopped issuing such directives, enforcement ceased, and piracy and illegal circumvention activities online anecdotally increased.<sup>15</sup> MOE should now issue clear directives to TRA to take steps as they did in the past to ensure infringing copyright content is not available to users within the UAE. In addition, MOE needs to resume working with TRA with respect to the sale of hard goods piracy or circumvention technologies or devices over the Internet. Unfortunately, notwithstanding significant industry preparatory activities, including test purchases of circumvention devices, MOE has not provided proper instructions to TRA.<sup>16</sup> In the meantime, in the face of MOE having ceased to inform TRA on significant piracy and circumvention services, significant numbers of users in the UAE are now downloading illegal content, namely, pirate content and circumvention tools.<sup>17</sup> The industry has

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<sup>8</sup>International Telecommunication Union, *Fixed Broadband Subscriptions 2000-2011*, at <http://www.itu.int/ITU-D/ict/statistics/material/excel/Fixed%20broadband%202000-2011.xls>, accessed on January 12, 2013.

<sup>9</sup>United Arab Emirates Telecommunications Regulatory Board (TRA), at [http://www.tra.gov.ae/latest\\_statistics.php](http://www.tra.gov.ae/latest_statistics.php).

<sup>10</sup>International Telecommunication Union, *Mobile Cellular Phone Subscriptions 2000-2011*, at <http://www.itu.int/ITU-D/ict/statistics/material/excel/Mobile-cellular2000-2011.xls>, accessed on January 12, 2013.

<sup>11</sup>*Half of Users Access Internet via Mobile in UAE*, Emirates 24/7, Feb. 2, 2011, at <http://www.emirates247.com/business/technology/half-of-users-access-internet-via-mobile-in-uae-2011-02-02-1.350716>.

<sup>12</sup>The music industry is one of the hardest hit industries by Internet piracy. Local record producer Joshua Williams, who runs the JFW Music & Sound recording studio in Al Quoz in Dubai, was recently quoted saying, "Illegal downloading has completely changed the music scene and makes it impossible for people like myself to survive." See Marie-Louise Olson, *supra* note 4.

<sup>13</sup>For example, USTR continues to list *thepiratebay* in its Notorious Markets Report, since, "[d]espite the criminal conviction of its founders, Sweden-based PirateBay continues to facilitate the download of unauthorized content." USTR also listed *Kat.ph* (formerly *kickasstorrents*) as "notable for its commercial look and feel" and as being "ranked by Alexa.com among the top 135 most visited sites in the world, and within the top 40 sites visited in the Philippines, Pakistan and Sri Lanka." See United States Trade Representative, *Out-of-Cycle Review of Notorious Markets*, December 13, 2012, at <http://www.ustr.gov/sites/default/files/121312%20Notorious%20Markets%20List.pdf>. IIPA, in its Notorious Markets filing to USTR, listed *Isophunt* which has been notified to MOE. See International Intellectual Property Alliance (IIPA), *Submission Re: IIPA Written Submission Re: 2012 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 77 Fed. Reg. 48583 (August 14, 2012), Docket No. USTR-2011-0011, September 14, 2012, at [http://www.iipa.com/pdf/2012\\_Sep14\\_Notorious\\_Markets.pdf](http://www.iipa.com/pdf/2012_Sep14_Notorious_Markets.pdf). Other sites notified to MOE have titles like "dvd4arab," "tvboxarabia," "3arabtv," indicating they clearly are targeted toward an Arabic language audience. Other sites notified as being available in UAE either have "torrent" in their title, indicating a connection with the bittorrent technology for rapid file sharing, "warez" or other indicators of involvement in unauthorized content.

<sup>14</sup>Representatives working on behalf of the entertainment software industry have reported takedowns of hundreds of auction sites including *souq.com* (which provided illegal movies, TV series, pay-TV programs and bouquets, and games) and *dubizzle.com* which were suspected of selling "Jailbreak" circumvention technologies/devices.

<sup>15</sup>The position of MOE is apparently that the UAE Copyright Law needs to be amended in order to address Internet piracy before MOE can issue further directives, and that draft amendments to the Law would accomplish what is needed for such directives to recommence. In the meantime, anecdotally, an entertainment software company noticed that circumvention activities online trended upward since enforcement ceased, and the number of downloads also increased significantly in the absence of enforcement until it began taking counter-measures.

<sup>16</sup>Several anecdotal instances indicate that TRA is ready to resume its activities of working with right holders to ensure pirated materials or illegal circumvention tools or technologies are not available in the UAE. The ball seems to be in MOE's court at present.

<sup>17</sup>In the absence of MOE cooperation on Internet piracy and the sale of pirated merchandise or circumvention tools over the Internet, the Dubai Police Department has apparently been helpful, for which they should be commended. Industry representatives have also approached the Emirates Intellectual Property Association, the Office of the Public Prosecutor, the Abu Dhabi Police and the TRA for guidance.

tried to fill the void with notifications to some of the sites to demand that they cease distributing pirated content, and similarly, we understand the MOE has sent their own notifications to cease distributing copyrighted content without authorization. Instances remain up, however.

**Enforcement Efforts Otherwise Excel in the UAE:** The UAE has for many years enjoyed a status as a model for the Gulf region, given the exemplary enforcement efforts on the part of the UAE enforcement authorities, good court judgments, and deterrent enforcement results, resulting in significant reductions in piracy levels. Notwithstanding difficulties in Internet enforcement experienced with the MOE, other departments have excelled in combating piracy. For example, the UAE Police have systematically raided sources of physical piracy, and also established a specialized unit (the Economic Crimes Section) to routinely deal with all IPR infringement issues. In addition, the UAE Police force has established within it a computer cybercrime unit to deal specifically with Internet violations and have effected numerous raids against servers involved in copyright piracy activities within the country. The judiciary remains a strong point in the UAE system for the protection of IP infringements, routinely issuing judgments including prison sentences against serious copyright violations. Finally, the various municipalities have officers that regularly arrest and seize unlicensed pirate optical disc sales, driving such activities underground.

## **COPYRIGHT LAW AND RELATED ISSUES**

Copyright protection in the UAE is provided by virtue of Federal Law No. 7 (2002) Concerning Copyrights and Neighboring Rights (effective July 1, 2002). The UAE became a member of the WTO on April 10, 1996 and thus is bound to abide by the TRIPS agreement. The UAE acceded to the Berne Convention and the WIPO Copyright Treaty (WCT) effective July 14, 2004 (but the UAE must also join the WIPO Performances and Phonograms Treaty, the WPPT). Reportedly, the Ministry of Economy plans to enact amendments to the Copyright Law to make certain needed changes, following a study by the Abu Dhabi Technology Development Committee which was to be released in early 2012.<sup>18</sup> The plans reportedly include tougher policing and the establishment of specialized intellectual piracy courts. The current Law contains only rudimentary protections against the unauthorized act of circumvention of technological protection measures (TPMs) and against the trafficking in devices, technologies, components, and services that facilitate the circumvention of TPMs.<sup>19</sup>

A few areas remain of concern, including some potentially unreasonable restrictions on the ability to freely contract,<sup>20</sup> the compulsory license provisions which require implementing regulations to ensure they are in conformity with the Berne Appendix,<sup>21</sup> and restrictions on the ability of joint authors to use joint works without permission of the other joint author (Article 25). It also must be confirmed that TRIPS-compatible enforcement procedures are included, such as *ex parte* civil searches. In addition, the UAE should take the opportunity of amendments to 1) provide for statutory (pre-established) damages, 2) add a presumption of subsistence of copyright, 3) extend terms of protection to life plus 70 for natural authors and 95 years for works of corporate authors, 4) confirm that costs and attorney fees are available, 5) provide protection against unauthorized decryption of program-carrying signals and the manufacture of decryption devices (and provision of decryption services), 6) raise minimum and maximum fines for copyright

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<sup>18</sup>Marie-Louise Olson, *supra* note 4.

<sup>19</sup>It should be made clear that both 1) the act of circumvention of technological protection measures that effectively control access to copyrighted materials or materials, and the circumvention of TPMs that effectively control the exercise of exclusive rights, and 2) trafficking in devices, technologies, components, and services that facilitate the circumvention of both access control TPMs (independent of the existence of any infringement) and copy-control TPMs, are covered. It should also be confirmed that access control TPMs are covered (at present, Article 38(1) covers a TPM "for preservation of specific standard of quality of the copies," which does not seem to cover all access control TPMs). Violations involving TPMs should be subject to both civil and criminal remedies which appears to be the case except TPMs violations are described in Article 38 which is a criminal penalty provision.

<sup>20</sup>For example, Articles 11 (right of transferor to return to court for reconsideration) and 15 (making invalid "any action" with respect to "more than five" of an author's works) are unreasonable restrictions, and should be left in general to marketplace solutions rather than be restricted as there are here by statute.

<sup>21</sup>Article 21 of the law provides for the possibility of reproduction of translation compulsory licenses consistent with the Berne Convention Appendix. In 2004, when the UAE joined the Berne Convention, the government availed itself of the Berne Appendix. See Berne Convention Members, World Intellectual Property Organization, at <http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/berne.pdf>. In implementing the licenses, which are disfavored by copyright owners, the government of the UAE must ensure that strict adherence to the rules of the Appendix are followed.

infringement (Article 37), among other desirable improvements, and 7) confirm full retroactive protection.<sup>22</sup> In addition, there are at present no provisions specifically related to Internet infringements, namely, the extent to which Internet service providers should be held accountable for online infringements, including notice and takedown, as well as mechanisms to deal with non-hosted infringements, including fair and effective measures to deal with repeat infringers. In addition, the UAE government should ensure that it takes proper steps to legalize its use of software and other copyrighted materials, and ensure public computers and networks are not used in conjunction with copyright infringement activities.

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<sup>22</sup>The current fine structure is from 10,000 Dirhams (US\$2,700) to 50,000 Dirhams (US\$13,600). The minimum is definitely believed to be too low to constitute a deterrent to further infringements as required by the TRIPS Agreement.

# VIETNAM

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** Vietnam should remain on the Watch List.<sup>1</sup>

**Executive Summary:** IIPA hopes the issuance and entry into force in 2012 of the Ministry of Information and Communications (MIC) and Ministry of Culture, Sports, and Tourism (MCST) Joint Circular on Stipulations on the Responsibilities for Intermediary Service Providers in the Protection of Copyright and Related Rights on the Internet and Telecommunications Networks will lead to significant reductions in online and mobile piracy in the country, including closures of notorious websites and services built on copyright infringement. The IP Code, Criminal Code, administrative enforcement Ordinances and Decrees, and judicial reform, must all be brought to bear to significantly reduce all forms of piracy, including online and mobile piracy, enterprise end-user piracy of software, physical piracy, and book piracy which remain largely unchecked in Vietnam. The Vietnamese have long recognized that piracy in the country is increasingly “sophisticated” and involves violations of “[m]ost of the objects of the rights.”<sup>2</sup> The Vietnamese government has taken very few enforcement actions over the years, and to our knowledge, no criminal case has ever been brought to address copyright piracy. The software industry reports greater support in terms of numbers of raids from MCST and the Department of Anti-High Tech Crimes of the Ministry of Public Security (MPS) in 2012, but even then, administrative fines meted out are the statutory minimum and fail to deter piracy. The Vietnamese government has largely ignored concerns over onerous market access restrictions.

### PRIORITY ACTIONS REQUESTED IN 2013

#### Enforcement

- Enforce new Joint Circular, taking effective measures against notorious infringing sites whose business models are based on providing access to infringing content, including sites identified in this report (e.g., *nghenhac.info*, *vui.vn*, *Zing.vn*, *Socbay.com*, *Tamtay.cn*, *xemphimonlines.com*, *phimvang.org*, *xuongphim.com*, *viettorrent.vn*, *ephim24g.net*, and *phim.soha.vn*).
- Devote greater resources and MCST Inspectorate, Economic Police, and High Tech Police manpower to running raids and bringing administrative raids and launching cases under the Criminal Code, e.g., against online piracy, end-user piracy of software, retail and source piracy, CD-R burning labs, reprinting/photocopying facilities, etc., imposing maximum administrative fines.
- Reduce piratical imports from China.
- Develop and finalize IP Manual for Vietnamese Judges, conduct training and outline implementing guidance for the Criminal Code, then conduct software piracy raids and bring such cases to the Criminal Court in 2013.

#### Legislation

- Issue implementing guidance for the revised Criminal Code so that prosecutions can commence, in line with Vietnam’s Bilateral Trade Agreement (BTA) obligation, including by i) confirming that the Code applies to online distributions and all other violations of the IP Code, and ii) providing detailed interpretations of “commercial scale” infringements that include those undertaken without a profit motive.
- 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.
- Join the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).

<sup>1</sup>For more details on Vietnam’s Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2013SPEC301HISTORICALSUMMARY.pdf>.

Please also see previous years’ reports at <http://www.iipa.com/countryreports.html>.

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



- Clarify Decree No. 85 measures that appear to impose onerous restrictions on collective management, namely, by ensuring those provisions do not apply to foreign collective management organizations (CMOs) or the administration of foreign rights.
- 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.
- 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.

### Market Access

- 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. For example, the Vietnamese government should further suspend or repeal regulations imposed in the pay-TV sector requiring the appointment of local agents, mandatory translations, and advertising restrictions.

## PIRACY UPDATES IN VIETNAM

**Internet and Mobile Piracy Causing Severe Damage to Copyright Owners:** 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. Internet penetration continued on an upward path, with reportedly 31.1 million Internet users according to the Ministry of Information and Communications (MIC) of Vietnam, with 3G mobile Internet users reaching 16 million (18% of the country's population).<sup>3</sup> Vietnam ranks 18th in the world, 8th in Asia, and 3rd in Southeast Asia in the total number of Internet users. Broadband usage expanded rapidly in 2010, up to 3.8 million fixed broadband subscriptions or 4.3% of the population.<sup>4</sup> According to MIC, there are 19 Internet service providers, some 1,064 licensed websites, and 335 social networks operating in Vietnam.<sup>5</sup> Unfortunately, the vast majority of websites dealing in copyright content remain unlicensed,<sup>6</sup> although there are now a few operators of online services providing licensed music (representing, however, only 1% of online music services). The rest are streaming and download sites (50%), forums (21%), video websites (17%), search engines (8%), deeplinking, cyberlocker, and social network sites all being employed to deliver unlicensed copyright content, including music, movies, entertainment and software, and published materials.<sup>7</sup> 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 and film piracy problem in Vietnam is now impacting overseas markets. Notorious websites include *Zing.vn*, *Tamtay.cn* and *Socbay.com*; forum sites like *kenh14.vn*, *yeuamnhac.com*, *hihihehe.com*;<sup>8</sup> streaming sites (offering unauthorized video and audio content) like *phimiphone.com*, *phim.livevn.com*, *phim.soha.vn*, *phimhit.com*, *funring.vn*, *nghenhac.info*, *nhac.vietgiaitri.com*, *Nhac.vui.vn*, and *Yeucahat.com*; direct download sites like *viettorrent.vn*, *forumphim.com*, and *phimfullhd.com*; and cyberlockers used for piracy like *fshare.vn* and *up.4share.vn*. University networks are increasingly being used for dissemination of infringing content.

<sup>3</sup>Vietnam Ranks World's 18th for Most Internet Users, Global Times, December 4, 2012, at <http://www.globaltimes.cn/content/748146.shtml>.

<sup>4</sup> International Telecommunication Union, *Fixed Broadband Subscriptions 2000-2011*, at <http://www.itu.int/ITU-D/ict/statistics/material/excel/Fixed%20broadband%202000-2011.xls>, accessed on January 10, 2013.

<sup>5</sup>It is important to note that, for example, more than half of the unlicensed online music services are operated by companies. In addition, for licensed Internet content providers, the government has business registration, certificates of domain name registrations and details of legal representatives.

<sup>6</sup>There is clearly a strong demand in Vietnam for copyright content with little regard to its legality, as recent survey results show. According 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* (on file with IIPA).

<sup>7</sup>The independent film and television segment of the motion picture industry (IFTA) reports that online and physical piracy remains a significant export constraint for independent producers and distributors, the majority of which are small to medium sized businesses. Independent producers partner with local authorized distributors to finance and distribute their films and programming. Unable to compete with free, legitimate distributors are unable to commit to distribution agreements or offer drastically lower license fees which are inadequate to assist in financing of independent productions. Piracy is undermining and may permanently damage legitimate distribution networks essential to reaching the consumer and leaves little confidence for investment in intellectual property.

<sup>8</sup>Informal networks and forums used particularly by students but also by other Internet providers are increasingly used for dissemination of infringing content.

*Zing.vn*, well documented in last year's IIPA Special 301 report,<sup>9</sup> was proposed by IIPA as a "notorious market" in its Special 301 out-of-cycle review submission in September 2012, and USTR agreed in its December 2012 announcement.<sup>10</sup> USTR noted in its announcement, "In addition to being a social media site, Vietnam-based *Zing.vn* also includes an infringing deeplinking music portal, which reportedly attracts large numbers of users to the site." They also indicated, "We understand that VNG, *Zing*'s parent company is currently in talks with rights holders to obtain the necessary licenses to transition *Zing* into an authorized digital music platform." ComScore recorded 470,000 Internet users from South Korea visiting *mp3.zing.vn* in June 2012, an increase of 270% over the same period in 2011. The Vietnamese government has not come forward with any explanation as to why no enforcement action has been taken. In October 2012, the Coca-Cola Company and Samsung decided to pull advertising from *zing.vn*.<sup>11</sup> Then in late November, the U.S. Embassy "suspended" its *zing.vn* account, with the State Department noting, "the suspension is part of a dialogue with *ZingMe*'s parent company, VNG, about intellectual property rights and digital piracy. He said the embassy hopes to be able to reactivate its account after "adequate progress" is made on the property rights issue."<sup>12</sup>

With rapid increases in mobile phone subscribers in Vietnam, 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.

**Enterprise End-User Piracy of Software Harms the Software Industry and Stunts the Growth of the IT Sector:** The software industry reports a continued high level of software piracy in Vietnam. In 2011, the software piracy rate in Vietnam was 81% (among the highest in the world), representing a commercial value of unlicensed software of US\$395 million.<sup>13</sup> This includes widespread unlicensed software use by enterprises in Vietnam, retail piracy, and hard disk loading of unlicensed software. Most leading cities, such as Hanoi, Ho Chi Minh City, Đà Nẵng, and Hải Phòng are key software piracy hotspots. A 2010 study done by the International Data Corporation (IDC) with BSA | The 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. The industry also notes the desperate need for legalization of software usage within the Vietnamese government. It has been recognized by some within the Vietnamese government that use of unlicensed commercial software is occurring within government ministries. Some initial discussions on government legalization have commenced between BSA and the Ministry of Information and

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<sup>9</sup>*Zing.vn* is an online portal service operated by VNG Corporation in Vietnam. *Zing.vn* provides various online services including an unauthorized online music and video portal, social networking, search engine and instant messaging. The unauthorized music portal site *mp3.zing.vn* draws over 60% of the Internet traffic within all the sub-domains of *Zing.vn* according to Alexa.com. Further, *Zing.vn* claimed that 77.6% of Vietnamese internet users visited *Zing* in which over 80% of them used *mp3.zing.vn*. *Zing.vn* remains an extremely damaging site in Vietnam, ranking as the 6th most visited site in that country, and is often visited in South Korea and Singapore, giving it a strong global ranking.

<sup>10</sup> See IIPA, *Submission Re: IIPA Written Submission Re: 2012 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 77 Fed. Reg. 48583 (August 14, 2012), Docket No. USTR-2011-0011, September 14, 2012, at [http://www.iipa.com/pdf/2012\\_Sep14\\_Notorious\\_Markets.pdf](http://www.iipa.com/pdf/2012_Sep14_Notorious_Markets.pdf); United States Trade Representative, *Out-of-Cycle Review of Notorious Markets*, December 13, 2012, at <http://www.ustr.gov/sites/default/files/121312%20Notorious%20Markets%20List.pdf>.

<sup>11</sup>Chris Brummitt, *APNewsBreak: Coke, Samsung Pull Vietnam Site Ads*, Associated Press, October 3, 2012, at <http://bigstory.ap.org/article/ coke-samsung-pull-ads-vietnam-website-citing-concerns-over-unlicensed-music-downloads>.

<sup>12</sup>U.S. *Suspends Embassy Account on Vietnam Website*, Associated Press, November 28, 2012, at [http://www.mercurynews.com/top-stories/ci\\_22085190](http://www.mercurynews.com/top-stories/ci_22085190).

<sup>13</sup>BSA | The Software Alliance's 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Vietnam was 81%, representing a commercial value of unlicensed software of US\$395 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA's 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

Communications (MIC), with a focus on legalization procedures and the government avoiding any mandates or preferences for the purchase of specific types of software.

**Physical Piracy Remains Rampant, Including Pirate Imports, Pirate Burned Content, Factory Production, and “Media Box” Piracy:** Evidence of physical piracy, including virtually 100% piracy of home video entertainment, can still be found everywhere in Vietnam, especially in urban areas. This includes major piracy hubs like Hanoi, Ho Chi Minh City, Đà Nẵng, Hải Phòng, and Vietnamese-Chinese border cities Lang Son and Mong Cai. With Internet piracy growing in larger urban areas, physical piracy is migrating to smaller provinces like Khánh Hòa, Đồng Nai, Bình Dương and Hưng Yên. It remains very easy to buy almost imported discs (from China mainly), burned discs or factory discs of any kind of content, and pirated software is readily available at shops on the so-called “PC streets” or other “CD-DVD” shops. 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-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. Online websites such as *minhtan.com*, *rangdong.com*, *vnnmall.com*, and *saigonsuperstore.com* are now being used to market hard goods pirate music CDs and karaoke DVDs. A recent phenomenon is the sale of “media boxes” which support BitTorrent file sharing clients and P2P downloads, as well as allowing the direct loading of copyright content prior to or as an after-service to sale of the hardware.

**Book and Journal Piracy Severely Harms Publishers:** Book and journal publishers continue to suffer from rampant piracy in Vietnam, in the form of illegal reprints and unauthorized photocopies. Bookshops, roadside vendors and copy shops all sell unauthorized copies of bestselling trade books, travel books and academic textbooks, and unlicensed print overruns continue to harm foreign publishers. Unauthorized translations produced by university lecturers or professors have been detected, in which the lecturers or professors append their name to the translated textbook.<sup>14</sup> 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. Concerns about piracy have been raised at many levels (country, district, and provincial), and local provincial authorities will conduct the periodic raid when prompted by a right holder, but the raid will generally result in the confiscation of goods and imposition of a small, non-deterrent fine. Moreover, there are currently no university or government efforts to address the endemic piracy on university campuses. Universities should implement appropriate use and copyright policies that promote respect for copyright and raise awareness among personnel, faculty, and students in order to discourage infringing behavior.

**Signal Piracy/Pay TV Piracy:** Vietnam's pay-TV sector now 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.<sup>15</sup> Vietnam boasts 4.2 million overall connections as of May 2010, and digital systems are taking hold (including through Vietnamese government infusion of capital).<sup>16</sup> 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

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<sup>14</sup> *Uni Faculty Members Accused of Plagiarism*, <http://english.vietnamnet.vn/education/201005/Uni-faculty-members-accused-of-plagiarism-910815/>.

<sup>15</sup> Louise 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) (on file with IIPA).

<sup>16</sup> Cable and Satellite Broadcasters Association of Asia (CASBAA), *CASBAA Release - Vietnam Pay-TV in Bloom*, May 7, 2011, at <http://www.casbaa.com/media-and-resources/news-center/casbaa-news/casbaa-news-archive/55-casbaa-release-vietnam-pay-tv-in-bloom>.

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.

## **ENFORCEMENT UPDATES IN VIETNAM**

**Failure to Address Internet and Mobile Device Piracy:** 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),<sup>17</sup> the government has been mainly inactive and disinterested. Cooperation from ISPs and content providers found to be involved in copyright infringement is extremely poor, with takedown rates for the music industry of less than 2%. Notorious piracy site *zing.vn* has 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 proof of advertising revenues and other commercial advantage); 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. Both MCST and the High Tech Police need to become more active in the fight against growing online piracy in Vietnam.

**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. To date, no specialized IP court has been established in Vietnam. Industry and the U.S. government are working with the Supreme Court in drafting an “IP Manual for Vietnamese Judges.”

**End-User Piracy Enforcement:** One relatively bright spot in enforcement seems to be in the area of addressing software piracy. In 2012, more raids were taken with participation of both MCST and the MPS Anti-High Tech Crime Police. Administrative fines remain relatively low, generally, VND50 million (around US\$2,400), never reaching the maximum applicable rate of VND500 million (US\$24,000). The industry also reports stronger support given to both enforcement and educational campaigns to sensitize the public to the need to use legal software. The presence of the High Tech Police is now seen as essential for the success of raids as they possess technical knowledge which is helpful to achieving effective raids. In addition to end-user raids, the software industry reports a handful of *ex officio* actions undertaken by provincial enforcement authorities, e.g., Son La Provincial Market Management Bureau against distributors of pirated software. The Copyright Office of Vietnam (COV) also partnered with the private sector on IP education and training in 2012. These trainings covered the overview of copyright laws and the value of IP and innovation. There remain no implementing guidelines for the revised Criminal Code, so no software piracy cases have ever been brought to Criminal Court.

**Very Little Enforcement Against Hard Goods Piracy:** Though MCST has indicated its recognition of the hard goods piracy problem, it has devoted very few resources to deal with physical piracy across Vietnam. 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

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<sup>17</sup>In addition to the sites listed in this filing, MCST and the Copyright Office of Vietnam (COV) have been informed of the following infringing websites: *7Sac.com*, *bbs.orkoo.com*, *clip.vn*, *galaxy.net*, *Gate.vn*, *giaitri24.vn*, *giaitriamnhac.info*, *karaoke.com.vn*, *kenh14.vn*, *livevn.com*, *nhaccuatui.com*, *noi.vn*, *onlinemtv.net*, *rap.vn*, *timnhanh.com*, *Top1.vn*, *truongton.net*, *vast.net.vn*, *Yeah1.com*, and *Yeumnhac.com*.

imports and pirated product destined for export by Customs, and criminal penalties can result in a significant reduction in piracy in Vietnam.

## **COPYRIGHT LAW AND RELATED ISSUES**

Copyright protection and enforcement in Vietnam is governed by the Intellectual Property Code (2005),<sup>18</sup> and 2009 amendments to that Code,<sup>19</sup> the Criminal Code (1999) and 2009 amendments to that Code,<sup>20</sup> and the Administrative Violations Ordinance,<sup>21</sup> as amended and interpreted by further Decrees (Nos. 47 and 109).<sup>22</sup> Various ministries also weigh in on important matters with other ancillary decrees, circulars, instructions, etc. The Civil Code<sup>23</sup> remains as a vestigial parallel law, implemented by Decree No. 100,<sup>24</sup> and as amended in late 2011 by Decree No. 85.<sup>25</sup> The laws, while not entirely in compliance with Vietnam's international or bilateral obligations, include a basic structure which could be adequate if fully implemented to address online and physical piracy phenomena in the country, although further improvements should be sought. They also include implementation of the "Internet" treaties, the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). Vietnam should now be encouraged as an immediate next step to join those treaties.

**Important New Joint Circular Can Promote Effective Internet Enforcement:** On June 19, 2012, the MIC and MCST issued the Joint Circular No. 07/2012/TTLT-BTTTT-BVHTTDL on Stipulations on the Responsibilities for Intermediary Service Providers in the Protection of Copyright and Related Rights on the Internet and Telecommunications Networks, which entered into effect August 6, 2012. This JC, if fully implemented, could result in significant reductions in online piracy in Vietnam and greater service provider cooperation and responsibility. The JC imposes high standards of performance on "providers of intermediary services"<sup>26</sup> defined as "a) Internet service providers; b) Telecommunications providers; c) Providers of service for storage of digital information, including the rental service for storage of electronic information websites; d) Providers of online social media networks; and e) Providers of digital information search service." Namely, "providers of intermediary services" must take affirmative steps to "Establish a system to examine, supervise and process the information that is uploaded, stored and transmitted on internet and telecommunications networks in order to prevent violations of copyrights and related rights," and "Unilaterally refuse to provide a service that runs counter to the laws on copyright and related rights."

Importantly, the JC also requires the providers of intermediary services to "Remove and erase the digital content that violates the copyright and related rights; terminate, stop and temporarily suspend the internet and telecommunications services upon receiving a written request of the MIC Inspectorate, MCST Inspectorate, or of other government authorities in accordance with the law." Additional requirements are imposed upon social network operators to "send a warning of a responsibility to compensate for civil damages and a possibility of being subject to administrative sanctions and criminal prosecution to a social media user who commits an act that violates copyright and related rights." The JC requires providers of intermediary services to be "Subject to the inspection and examination conducted by state management authorities in compliance with the regulations on copyright and related

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<sup>18</sup>Law No. 50/2005/QH11, Pursuant to the Constitution 1992 of the Socialist Republic of Vietnam as amended and supplemented by the Resolution No. 51, 2001, QH10 of the 10th Section of the 10th National Assembly dated December 25, 2005, entry into force July 1, 2006.

<sup>19</sup>National Assembly of Law No. 36/2009/QH12, "Law on Amendment of and Supplement to Some Articles of the Intellectual Property Law," entry into force January 1, 2010.

<sup>20</sup>Law No. 37/2009/QH12 Amending and Supplementing a Number of Articles of the Penal Code, Law Amending and Supplementing a Number of Articles of the Penal Code, entry into force June 19, 2009.

<sup>21</sup>Ordinance No. 04/2008/PL-UBTVQH12 on Handling of Administrative Violations, entry into force August 1, 2008.

<sup>22</sup>Decree No. 47/2009/ND-CP of May 13, 2009, on Sanctioning Administrative Violations of Copyright And Related Rights, entry into force June 30, 2009; Decree No. 109/2011/ND-CP of December 2, 2011 on Amending and supplementing Some Articles of the Decree No. 47/2009/ND-CP Dated May 13, 2009 of the Government on Sanctioning of Administrative Violations of Copyright and Related Rights, entry into force January 20, 2012.

<sup>23</sup>Civil Code, (No. 33/2005/QH11), entry into force July 1, 2006.

<sup>24</sup>Decree No. 100/2006/ND-CP of September 21, 2006, Detailing and Guiding the Implementation of a Number of Articles of the Civil Code and the Intellectual Property Law Regarding the Copyright and Related Rights, September 21, 2006, entry into force October 17, 2006.

<sup>25</sup>Decree 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, entry into force November 10, 2011.

<sup>26</sup>Intermediary services are defined as "telecommunications service, internet service, online social media network service, digital information search service, rental services for storage of digital information, including the rental service for storage of electronic information websites."

rights.” Finally, but not least, liability is possible when copyright is violated or technological protection measures (TPMs) are removed, including liability for “Having operations like a secondary distributor of the digital content generated from violations of the copyright and related rights.”

Industry hopes that Vietnam can maintain momentum and make adjustments such as: 1) providing clear basis regarding the joint or secondary liability of the ISP for copyright infringement committed by a user; 2) introducing appropriately limited safe harbor provisions including an expeditious and effective notice and takedown regime; and 3) taking other necessary measures to create greater accountability in the Internet environment and to create incentives for all actors in the distribution chain to take reasonable and appropriate action to address infringement, including fair and effective means to stop non-hosted infringements and deal with repeat infringers.

**Criminal Code Should Cover All IP Code Violations, Remains Incompatible With BTA; New Inter-Ministerial Circular Should Be Issued Forthwith, Confirming Criminal Liability for All IP Code Violations:** The Criminal Code as amended criminalizes “commercial scale” acts of “[c]opying of works, audio recordings and visual recordings” or “[d]istributing the copies of work, audio or video recording.” 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. Unfortunately, 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 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 meets its commitments under the BTA with the United States.<sup>27</sup>

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 Vietnamese government 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 Trans Pacific Partnership (TPP).<sup>28</sup>

Over a year ago, IIPA understood that an Inter-Ministerial Circular to implement the revised Criminal Code was to be issued. IIPA understands the drafting team was headed by the Inspectorate of the Ministry of Science and 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) as well as other violations of the IP Code.<sup>29</sup> It would also be important for the Vietnamese government to provide

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<sup>27</sup>See *Agreement Between The United States of America and The Socialist Republic of Vietnam on Trade Relations*, July 13, 2000 (BTA).

<sup>28</sup>Chapter VII, Article 5(3) of the BTA provides in relevant part,

The Parties agree to establish a Joint Committee (“Committee”) on Development of Economic and Trade Relations between Vietnam and the United States of America. The Committee’s responsibilities shall include the following:

A. monitoring and securing the implementation of this Agreement and making recommendations to achieve the objectives of this Agreement;

...

C. serving as the appropriate channel through which the Parties shall consult at the request of either Party to discuss and resolve matters arising from interpretation or implementation of this Agreement....

<sup>29</sup>Specifically, to ensure proper coverage of commercial scale Internet-based copyright infringements, which cause enormous commercial damage to copyright owners, those drafting interpretations should ensure that Internet transmissions are included within the term “distributing,” so that communicating works to the

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 Enforcement Decrees Must Be Implemented in Practice:** Several ordinances and decrees (most notably, Ordinance Nos. 44 and 04, and Decrees Nos. 47 and 109) govern administrative enforcement of copyright in Vietnam. Ordinance Nos. 44 (2002) and 04 (2008) form the basis for administrative enforcement. Ordinance No. 04 raised the maximum fine up to VND500 million (about US\$24,000), and provides for revocation of business licenses and confiscation of material evidence and means used in administrative violations, for “acts of administrative violation in the domains of intellectual property,” namely “intentionally or unintentionally commit acts of violating law provisions on State management, which, however, do not constitute crimes and, as required by law, must be administratively sanctioned.” Decree No. 47 then further refines (in Article 1) acts to be covered as “administrative violations of copyright and related rights intentionally or unintentionally committed by organizations and individuals under the law on copyright and related rights, which do not constitute criminal offenses but, as prescribed by this Decree, are subject to administrative sanction.” Thus, administrative liability 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 IP Code.

Remedies also include (pursuant to Article 3 of Decree No. 47) 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, Decree No. 47 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 different fine structures, for illegally making derivative works, displaying (or performing) works to the public, reproducing works, distributing or importing works, communicating works to the public by wireless or wired means, electronic information networks or other technical means, and rental of cinematographic works or computer programs.

On December 2, 2011, the Prime Minister approved Decree No. 109 on amending and supplementing some articles of Decree 47. Decree No. 109 deals in large part with valuation of infringed commodities in order to determine the fine structure, but also helpfully restates the further remedies of “Forced destruction of infringed commodities; forced destruction or putting into use of raw materials, materials, means and equipment used for production of the infringed commodities,” and “Forced removal of electronic copies of works from the Internet, informatics and electronics devices and other equipment.” The Decree also adds to the administrative liability structure to provide penalties of a fine between VND10 million (US\$475) and VND90 million (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. Unfortunately, administrative remedies in Vietnam as implemented have been mostly non-deterrent, with the maximum fine never imposed. While the Ordinances and Decrees 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 Ordinances and Decrees 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.

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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.

**Concerns Arising from Decree No. 85:** Decree No. 85, amending certain provisions of the Civil Code related to IP protection, was issued in 2011 without any public consultation period or other form of transparency with the U.S. government or industry. This is highly unfortunate, since both would have had comments. Decree No. 85 contains some helpful clarifications,<sup>30</sup> but 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 WCT and WPPT.
- **Collective Management:** Article 11 of Decree No. 85 makes certain changes to Article 41 of Implementing Decree No. 100 governing 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. In the absence of immediate changes, it should be clarified that these provisions do not apply to administration of foreign rights.

- **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

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<sup>30</sup>For 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 transmi[ssion] 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.

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, the government 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.<sup>31</sup> To the extent the “principals and methods” are meant as compulsory, it should be clarified that these provisions do not apply to administration of foreign rights.

**IP Code and 2009 Amendments Remains Incompatible with the BTA and Vietnam’s Other International Obligations:** The IP Code and amendments have made a number of improvements in the overall protection of copyright in Vietnam. Yet, they leave questions with respect to Vietnam’s compliance with the BTA and other international obligations/standards, and could afford further upgrades in the future.<sup>32</sup>

- **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 amends 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.
- **Making Available Right (WPPT):** 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 (TRIPS):** 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.

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<sup>31</sup>See 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.

<sup>32</sup>In addition to the remaining issues discussed in the text below, IIPA urges the government to introduce pre-established (statutory) damages, 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.

- **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 (TRIPS):** 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.”<sup>33</sup> The Vietnamese government has taken the position that nothing in Article 203 requires a registration certificate as a formality and that it affords a presumption of ownership without production of a certificate. Vietnam must adhere to the “no formalities” principle of Berne and TRIPS, and Article 3.2 of the BTA.<sup>34</sup>
- **“Compelling Distribution or Use for Non-Commercial Purpose of Goods, Materials and Implements”:** Articles 202(5) and 214(3) of the IP Code provide that remedies for copyright infringement may include compelling the distribution or use for non-commercial purpose of the infringing goods, as well as the materials and equipment used in furtherance of the infringement, provided that such distribution does not affect the exploitation of rights by an aggrieved right holder. These provisions fall short of Vietnam’s BTA (Article 12.4) and TRIPS obligations.<sup>35</sup>

**Vietnam 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

<sup>33</sup>Articles 208(1) (regarding provisional measures) and 217(1)(a) (with respect to border measures) of the Code apply the same standard of proof as Article 203.

<sup>34</sup>Article 3(2) of the BTA provides, “[a] Party shall not ... require right holders to comply with any formalities or conditions ... in order to acquire, enjoy, enforce and exercise rights or benefits in respect of copyright and related rights.”

<sup>35</sup>The government of Vietnam points to “Circular 01/TTLT-TANDTC-VKSNDTC-BCA-BTP of February 29, 2008,” which indicates that in case any law of Vietnam or international treaty to which Vietnam is party “provides that infringing goods, materials, equipments must be destroyed, the proceeding agencies must destroy them even if they still have use value.” This response seems helpful, although it may not fully satisfy the default rule in the IP Code, since that Code does not compel the destruction of infringing goods.

countries in the region, as well as other previous hotspots of camcording piracy, have enacted statutes outlawing the use of (or the attempt to use) an audiovisual recording device in a movie theater to make or transmit an audiovisual work (in whole or part). Vietnam should swiftly amend its law to address this problem which is causing increasing harm throughout the region.

**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.<sup>36</sup> Unfortunately, Vietnam's restrictive policies on foreign investment operate as a limitation on investment in cultural production, thus, undermining this objective.

IIPA has included extensive discussions of various market access barriers in previous submissions. The following provides a summary and, where applicable, updates.

**Concerning Regulatory Intervention in the Pay-TV Sector:** Decision No. 20/2011/QĐ-TTg issued in 2011 would, if not reversed, severely impede the continued growth and development of the pay-TV industry in Vietnam. We understand the Decision was further suspended in part for six months as of November 15, 2012. This Decision should be formally and permanently scrapped in its entirety. If fully implemented, the Decision would require 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 would be required to be edited and translated by an approved, licensed press agent. New local language subtitling requirements would be imposed for most programming, as well as imprecise content guidelines and new registration requirements. The Decision also provides that all commercial advertisements airing on such channels in Vietnam would have to be produced in Vietnam. Further, these regulations essentially would expand censorship requirements to all channels, while such regulations had previously applied solely to "sensitive" channels. This mandate also would appear 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. The import plan and the contents of foreign films must also be pre-approved.

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<sup>36</sup>See Asia-Europe Meeting (ASEM) Seminar on Cultural Diversity in Hanoi on Dec. 15, 2008, discussed in *Vietnam Prioritises Preservation of Cultural Diversity*, Nhan Dan, March 26, 2009, at [http://www.nhandan.com.vn/english/culture/171208/culture\\_v.htm](http://www.nhandan.com.vn/english/culture/171208/culture_v.htm).

**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 ten to fifteen 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%.<sup>37</sup> 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:** MCST has censorship authority and maintains strict censorship of the content of films, television and home video, including foreign content. Because of the broad discretion delegated to the reviewing authority resulting in unpredictable and arbitrary results, the process inevitably becomes highly dependent on personal relationships. Films that require editing are subject to an additional review, though importers are not assured a right of appeal. The implementation of a classification and rating system would be preferred for the development of the theatrical market in Vietnam as opposed to its existing censorship process.

**Onerous Market Access Restrictions on the Music Sector:** Onerous Vietnamese restrictions prevent U.S. record companies from engaging in production, publishing, distribution and marketing of sound recordings in Vietnam. Vietnam maintains investment barriers against foreign sound recording companies, many of which are of a discriminatory nature. Vietnam made no commitments with respect to production, publication and distribution of sound recordings under the General Agreement on Trade in Services (GATS) as part of its WTO accession. Vietnamese restrictions on the business of making and selling music stifle the development of the Vietnamese music industry, and deny participation of U.S. companies in the market.<sup>38</sup> The lack of a meaningful commercial presence of

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<sup>37</sup>Decree No. 96/2007/ND-CP dated June 6, 2007 *Detailing and Guiding the Implementation of a Number of Articles of the Cinematography Law*, Article 2.4.

<sup>38</sup>Under present rules in Vietnam and in the absence of bilateral or multilateral commitments, the ability of foreign sound recording companies to set up subsidiaries to produce or distribute “cultural products” is unclear. It appears that foreign sound recording companies must license a Vietnamese company. Vietnamese companies have not been interested in licensing legitimate product from American companies given that pirated versions of these products are already readily available in the Vietnamese market. Thus, right holders in sound recordings (and musical compositions), especially with respect to physical product, are largely excluded from the market. U.S. right holders should be permitted to establish wholly-owned subsidiaries in Vietnam that are permitted to engage in all industry activities, including but not limited to creation, manufacture, sale, promotion, publication, distribution, and advertising. It is especially important that foreign-owned enterprises be permitted to invest in Vietnam for the purpose of importing and distributing recorded music for online and mobile distribution to the public. Vietnam’s failure to make any significant commitments to market access for U.S. and other foreign record companies within the framework of the WTO accession agreement is, 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

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,<sup>39</sup> and to establish music publishing houses and websites to publish and distribute legitimate music products in Vietnam.

**Potential Examination Procedure for Digital Music Products:** Article 11 of the Decree No. 11/2006/ND-CP dated 18 January 2006 provides that:

“Locally produced or imported music and theatrical tapes and discs must be previewed and granted permits by competent state agencies before they can be widely circulated. Music and theatrical tapes and discs permitted for wide circulation must be stuck with control labels according to regulations of the Ministry of Culture and Information.”

Clarifications are needed as to whether this “preview” procedure is required for digital music products (if no physical products are being circulated). Any cumbersome examination system which delays the normal release schedule of legitimate music would give rise to a huge advantage to pirates over legitimate sales channels in Vietnam. This problem is especially serious for international releases as they usually release earlier in other markets before they make available in Vietnamese market.

**Discriminatory Consumption Tax on Imported Game Products:** IIPA had previously received information about a draft decree of the MIC 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.<sup>40</sup> 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.

**New Draft Decree Would Exacerbate Already 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.<sup>41</sup> 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. In mid-2012, Vietnam issued a new Draft Decree on the Management, Provision and Use of Internet Services and Information on the Network (3rd Draft). IIPA expresses serious reservations and concerns about this Draft Decree. The Draft Decree would cut off inflows of financial capital, human capital and technology. Included in the problematic draft provisions are discriminatory provisions against so-called “foreign information providers.” Among other problems, the Draft Decree would:

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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.

<sup>39</sup>The importation of cultural products like music is governed by Decree No. 103/2009/ND-CP on Promulgating the Regulation on Cultural Activities and Commercial Provision of Public Cultural Services and the Regulation on Cultural Activities and Commercial Provision of Public Cultural (promulgated together with the Government's Decree No. 10.V200/ND-CP of November 6, 2009). Decree No. 103 provides that circulation permits for tapes and discs produced or imported by central organizations are granted by MCST, while circulation permits for tapes and discs produced or imported by local organizations and individuals are granted by provincial-level CST Departments. The Decree provides for application procedures. However, limitations on foreign companies' setting up subsidiaries to produce or distribute “cultural products” in Vietnam also thereby limit foreign companies' abilities to apply for circulation permits. The application must be done by a local company. Vietnam should consider encouraging foreign investment by allowing foreign investors to apply for music content examination.

<sup>40</sup>See *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/duthaonghidinhhuongdanmotsodieucualuatcongngghethongtinvedichvucongngghethongtin.aspx>.

<sup>41</sup>The ban is imposed pursuant to MIC Inter-Ministerial Circular No. 60 (2010) and, to IIPA's knowledge, remains in effect. *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>.

- impose requirements to ensure that users in Vietnam can remove their personal information in its entirety from the foreign entity's data;
- limit capital participation in Vietnam's game industry to 49% of chartered capital (Article 35(4));
- require approval for the initial script and for any changes which is arbitrary and non-transparent;
- require location in Vietnam of the server for any online game, which is highly suspect under Vietnam's WTO commitments on "computer and related services";
- require an amendment of the license every time that there is a change in the location of a server providing service (Article 37(3)(a));
- require the government's written approval for any change in the game script or content, no matter how small, and without regard to its impact on the game play experience (Article 37(3)(c));
- prevent any network electronic game operator from increasing the value of virtual items from the value determined when the script was registered (Article 38(7)(b));
- require all network electronic game operators to apply technical measures to manage user accounts in order to prevent one physical person from playing more than 180 minutes per day (Article 38(11)); and
- require all games that facilitate exchange of information between players to comply with the Decree requirements for a social network (Articles 26 through 29) (Article 38(10)).

**MCST "Master Plan" Could Wreak Havoc on Film Industry:** MCST is drafting a rather ambitious 10-20 year master plan, to be finalized by June 2013, which aims to help develop the local film industry. Unfortunately, the plan could create more market access barriers for the U.S. motion picture and television industries in Vietnam. Our preliminary understanding of the Plan is that it contains a number of discriminatory barriers including screen quotas, mandates for showing Vietnamese movies only during prime time (7pm to 10pm) on weekends, State control over the management, distribution, and exhibition of films, and establishing a film fund that might be drawn from U.S. films' box office. Any plan that would create yet further market access hurdles in Vietnam should be scrapped.

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

Negotiations continue toward a high-standard, broad-based Trans-Pacific Partnership trade agreement, begun in 2009.<sup>42</sup> IIPA has submitted public comments to the U.S. government's Trade Policy Staff Committee which describe in greater detail the hoped-for results of a TPP negotiation, including a high-level IP chapter, high-level substantive copyright protection, high-level enforcement standards, provisions ensuring the free flow of electronic commerce products and services, and obligations to open markets to trade in copyright goods and services.<sup>43</sup> 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 continued economic stabilization in line with the Administration's goals. Vietnam has taken strides in its substantive laws which will make meeting the legal and enforcement 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 such as Vietnam not only to eliminate discriminatory taxes and policies, but to open Vietnam's market to foreign competition including

<sup>42</sup> 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>. In 2012, Canada and Mexico joined the TPP negotiations, bringing the total number of countries to eleven, including in addition Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore, the United States, and Vietnam.

<sup>43</sup>International Intellectual Property Alliance, *Public Comment Concerning the Proposed Trans-Pacific Partnership Free Trade Agreement with Singapore, Chile, New Zealand, Brunei Darussalam, Australia, Peru and Vietnam*, 74 Fed. Reg. 66,720 (December 16, 2009). See also International Intellectual Property Alliance, "Participation of Malaysia in the Trans-Pacific Partnership Trade Negotiations" IIPA Request to Testify and Testimony Regarding "Negotiating Objectives With Respect to Malaysia's Participation in the Ongoing Negotiations of a Trans-Pacific Partnership (TPP) Trade Agreement," 75 Fed. Reg. 64778 (October 20, 2010).

in the creative and cultural sectors. 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 is designed to promote economic growth in the developing world by providing preferential duty-free entry for products from designated beneficiary countries and territories. 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 GSP program, the filing did note several areas – both market access and IPR deficiencies – in which Vietnam does not fully meet the eligibility criteria. The piracy and market access barriers highlighted in this report are key reasons Vietnam should be scrutinized closely before being granted beneficiary status under the GSP program.

## **TRAINING AND PUBLIC AWARENESS**

IIPA members continue to provide training events and participated in workshops and roundtables sponsored by other organizations, with the aim of sensitizing the public in Vietnam to the importance of providing adequate and effective intellectual property protection, and to train Vietnamese government officials on specific aspects of the IP system and the needs of creators to enjoy their rights in Vietnam. For example, on November 29, 2012, the local Motion Picture Association provided Internet training in Hanoi for local government and industry officials. The event was co-sponsored by MPA, the U.S. Agency for International Development, and MCST and was attended by approximately 115 people. BSA held a press conference in May 2012 in Hanoi to announce its Global Piracy Study (with IDC), with participation of dozens of representatives of IPR-related government agencies such as Copyright Office of Vietnam, National Office of Intellectual Property, Inspectorate of MCST, Inspectorate of the Ministry of Science and Technology, the Supreme Court, and around 30 journalists. IIPA members have also provided assistance to the Supreme Court in drafting the “IP Manual for Vietnamese Judges” beginning in October 2012. In addition, BSA has been providing technical assistance on government software legalization to MIC officials since November 2012. Finally, a “hotline” to report piracy was set up in October 2012 to provide a platform to heighten awareness among companies in order to have them take steps to legalize software usage.

# ALBANIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that the U.S. Government actively monitor developments in Albania during 2013 with respect to the issues discussed in this Special Mention report.

**Executive Summary:** Several copyright industries, including the motion picture industry and the software industry in particular, note significant enforcement problems in Albania. According to BSA | The Software Alliance (BSA), the software piracy rate in Albania has held steady at around 75% for the past three years.<sup>1</sup>

In general, Albania's legal framework for IPR protection is sufficient. A new (and improved) Copyright Law was expected to be considered by the Parliament in 2012, but will now be considered in early 2013. The law is intended to implement key European Union directives (such as the 2004 Enforcement Directive). Drafts of the law are currently under final review by the government (Ministry of Culture and the Albanian Copyright Office), which has included input from 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 recent 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 existing and expected (near-term) legal reforms, enforcement activity by government authorities made no forward progress in 2012, according to the copyright industries. BSA reports that *ex officio* inspections against software pirates by the Albanian Copyright Office (ACO) and the other enforcement agencies, have not been effective. Until 2011, ACO was the sole agency with responsibility for monitoring and enforcing the marketplace for copyright materials. Under the July 2011 amendments, authority for inspections was transferred from ACO to a new system of *ad hoc* inspectors in the Ministry of Tourism and Culture, where it was hoped that more effective enforcement would result. Unfortunately, to date, this has not occurred as the move from ACO to *ad hoc* inspectors is still in limbo. Weakened enforcement is also a result of 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, under the new legal structure, there is a bifurcated system for the issuance of fines by ACO, and the collection of fines, by the tax authorities, who have still not collected any fines imposed (now more than a year after the re-structuring). It is expected that the 2013 legal reforms will further clarify the role of the tax (and other) authorities, to improve enforcement. There is also ACO restructuring, and provisions to strengthen its authority, as a part of the new Copyright Law expected to be adopted this year.

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<sup>1</sup>BSA | The Software Alliance's 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Albania was 75%, representing a commercial value of unlicensed software of US\$6 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA's 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.



The problems of inadequate enforcement persist for customs officials as well – where training, personnel, and experience is lacking (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.

In March 2012, Albania amended its Penal Code for infringements of industrial property rights, in compliance with the obligations set by the WTO TRIPS Agreement, but it made no changes relating to copyright infringements. The number of criminal proceedings commenced against unauthorized users of IPR materials increased overall (including patent and trademark matters), but there are still steps needed to effectively implement the national strategy for the enforcement of intellectual and industrial property rights (IPR), and to address copyright infringement in particular, including the need to enhance interagency cooperation. In 2011, there was only a single interagency meeting regarding the IPR implementation strategy, and only one in 2012 (there have been none scheduled for 2013, and parliamentary elections are set for June 2013).

Another recommendation for effective enforcement is the establishment of specialized IPR courts. A new law on Administrative Courts was passed last year; it was expected to bring improvements for administrative actions. But, to date, judges, prosecutors and enforcement agencies in general have lacked the requisite expertise to deal efficiently with IPR administrative remedies.

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 legislative priority, and the top enforcement priority is the proper implementation of the Law on Inspections, with the creation of and effective enforcement by *ad hoc* IPR inspectors. Other priority actions include: (1) amending the current Criminal Code to give state prosecutors *ex officio* authority to prosecute copyright infringements; (2) improving the resources, training and expertise of both the ACO and the Albanian Customs IPR Department in order to enable these authorities to start effectively pursuing IPR enforcement; (3) addressing the television piracy problem; (4) creating specialized IP courts (including an Administrative Court); and (5) conducting more IPR enforcement training, to improve IPR enforcement by judges, prosecutors and enforcement agencies.

# ESTONIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that the U.S. Government actively monitor developments in Estonia during 2013 with respect to the issues discussed in this Special Mention report.

**Executive Summary:** Several copyright industries, including in particular, the software industry, note significant enforcement problems in Estonia. According to BSA | The Software Alliance (BSA), the software piracy rate in Estonia has remained steady at about 50% for the past three years; it was 48% in 2011.<sup>2</sup> In short, IPR enforcement is not a priority of the Government of Estonia. There has been little public education on IPR protection or on the risks of liability for piracy, including unlicensed software use by enterprises. The Ministry of Justice has initiated a general decriminalization reform effort, including for offenses related to copyright infringement. There are also efforts underway to prepare a new Copyright Act, and to codify other IPR laws.

Almost 10 years ago (2004) a Memorandum of Understanding between the local anti-piracy organization (EOCP) and Estonian Internet Service Providers (ISPs) was agreed to to enable the removal of infringing materials. BSA continues to report that Internet piracy and enterprise end-user piracy remain prevalent forms of piracy harming software sales, and enforcement against them is weak, especially criminal enforcement.

There are three reasons for weak (criminal) enforcement in Estonia: (1) it is a low priority of the government; (2) a lack of resources; and (3) a lack of proper training of and competency by law enforcement authorities.

Unchanged from prior years, the Government of Estonia, and in particular, police and prosecutors, make IPR enforcement a low priority. There are virtually no *ex officio* actions commenced by the law enforcement authorities, and the cases commenced by rights holders are routinely dismissed. Those criminal proceedings that do move forward get dismissed (no “public interest”), even those with substantial monetary damages to rights holders. No more than one or two criminal cases per year go to the courts (thus the expertise of judges and prosecutors is very limited). These dismissals of criminal cases also impose added costs to rights holders who have to pay a fee in their civil cases when corresponding criminal cases are dismissed.

The police lack the resources to properly investigate and prosecute piracy. Only a few years ago, there were four or five people in specialized IP units in each of the four police prefectures in Estonia. In 2012, that number was reduced to one police officer, who also had other (non-IPR) duties as well. As a result, investigations of IPR crimes can take years, with many cases ending due to the expiration of legal timelines. This is true even for cases where the collection of evidence is not complicated. Additionally, the police do not routinely seize illegal materials, allowing infringers to continue their activities unabated.

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<sup>1</sup>For more details on Estonia's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2013SPEC301HISTORICALCHART.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2013 global issues, see our cover letter at <http://www.iipa.com/pdf/2013SPEC301COVERLETTER.pdf>.

<sup>2</sup>BSA | The Software Alliance's 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Estonia was 48%, representing a commercial value of unlicensed software of US\$25 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including notebooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA's 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.



Last, there is a lack of progress on copyright cases due to unfamiliarity on the part of law enforcement authorities, even though anti-piracy organizations have offered many training programs (in fact, some of the police training facilities do not offer IPR enforcement training as a part of their regular programs).

Civil IPR enforcement is also weak due to a number of procedural and statutory hurdles. Civil procedures are complicated, costly, and often entail unreasonable time limits and unwarranted delays (Code of Civil Procedure, 2006). The burden of proof for rights holders is very high, and there are no punitive or preventative damages in the Estonian IPR laws. As a result, infringers are usually only obligated to pay what a licensing fee would have been for the use of a work, providing little disincentive to infringement.

# HONG KONG

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR actively monitor developments in Hong Kong during 2013 with respect to the issues discussed in this Special Mention report.<sup>1</sup>

## LEGISLATIVE ISSUES

In the well-wired, mobile-connected, and tech-savvy Hong Kong Special Administrative Region (HKSAR), online piracy is the main concern of many copyright sectors, and a growing concern for all the others. Cyberlocker services (mainly based overseas), illegal streaming sites, and “black boxes” that access TV content without authorization from offshore websites are the main problems for the movie industry, while cyberlockers, peer-to-peer (P2P) services and forum sites offering links to unauthorized music files are cited by the recording industry,<sup>2</sup> and by the entertainment software sector, although many of the specific problem sites are different. Hong Kong enforcement authorities are actively engaged and generally responsive, and have close and productive working relationships with most right holder organizations. However, the HKSAR Government has long recognized that its Copyright Ordinance needs updating for the digital networked environment, and it has been working for more than six years to do so.<sup>3</sup> In 2012, however, the process hit an unexpected snag that led the Administration to shelve the effort. The top priority is to get the copyright reform effort back on track as promptly as possible in 2013.

The Copyright (Amendment) Bill 2011 was presented to the Legislative Council (LegCo) in June 2011. 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. It did fall short in a number of other areas,<sup>4</sup> but constructive discussions were underway to improve the Bill. However, in mid-2012, the LegCo suspended further consideration of the Bill, which had become embroiled in a controversy over whether criminal liability could arise from parodies. This meant that the Bill could not be taken up again until after legislative elections in September; and to date, the legislation has not been re-activated. Local copyright industry representatives have urged the government to propose specific amendments to address the parody issue, and to re-submit the Bill to the LegCo without further delay. IIPA urges USTR to reinforce this message. Hong Kong may have missed its chance to be on the cutting edge of copyright reform for the 21st century, but it is crucial that this key regional market not be allowed to slip too far behind. The government should focus on the passing of the present Bill as it is, and then start another round of public consultation on other issues as soon as possible. Any proposal for a full spectrum public consultation at this stage is a recipe for further delay for a measure whose enactment is already long overdue.<sup>5</sup>

<sup>1</sup>For more details on Hong Kong’s Special 301 history, see IIPA’s “History” appendix to this filing at <http://www.iipa.com/pdf/2013SPEC301HISTORICALCHART.pdf>, as well as the previous years’ reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA’s 2013 global issues, see our cover letter at <http://www.iipa.com/pdf/2013SPEC301COVERLETTER.pdf>.

<sup>2</sup>Sales of music in physical formats have plummeted in Hong Kong as a result of Internet piracy, and legitimate channels for online and mobile distribution of music have failed to take off.

<sup>3</sup>The process began with issuance of a consultation document in December 2006.

<sup>4</sup> Some of these shortcomings were discussed in IIPA’s 2012 Special 301 filing on Hong Kong, see <http://www.iipa.com/rbc/2012/2012SPEC301HONGKONG.PDF>. Hong Kong law also needs reform with respect to the efficient operations of the Copyright Tribunal, including authorizing orders for payment of interim licensing fees. The slow pace of Tribunal proceedings allows copyright works to continue to be used for excessive periods without any payment.

<sup>5</sup>For example, the issues that should be addressed in the next public consultation will likely include, but not be limited to, extension of copyright term; online border control measures; specific measures combating peer-to-peer infringement; additional damages and statutory damages; and further clarification on secondary liability and action against repeated offenders. These complex issues must not be allowed to hold up prompt action on the current Copyright (Amendment) Bill.



Improved public education on IP rights is essential to pave the way for the re-introduction of the Bill. Industry is working effectively with the Department of Intellectual Property on this, but the Education Bureau is being less cooperative. The Concern Group of IPR Education (“the Concern Group”), with members from different organizations in the content/copyright industry, was established in May 2012 to work for sorely needed improvements in school curricula regarding IPR. Aside from one meeting with staff in October 2012, the Concern Group has been unable to gain any feedback or reply from the Education Bureau, and requests for meetings with the Secretary have been ignored. IIPA urges the Hong Kong authorities to be more responsive on this important educational effort.

In parallel with the law reform effort, Hong Kong authorities had been engaging with stakeholders on a draft Code of Conduct for Online Service Providers (OSPs). While ultimately this Code would interlock with the legislation, with compliance with the Code creating a presumption that an OSP was entitled to a statutory safe harbor for its role in infringement involving its system or network, there is no reason why the Code discussions cannot progress even during the hiatus on the legislation. The most recent draft, issued in March 2012, was very similar to the January 2012 draft IIPA reviewed in its Special 301 filing last year.

One of the fundamental flaws of the draft Code, ever since the first version was unveiled in August 2011, is its failure to deal with those who persistently use the services of an OSP to infringe. These repeat infringers of copyright inflict a disproportionate share of the harm to copyright owners and to legitimate e-commerce that results from online infringement. 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 any material change in the infringing behavior of those subscribers doing the most harm; instead, it will squander resources that would be better expended in identifying repeat infringers and dealing with their persistent misconduct.

Another problem plaguing effective enforcement in Hong Kong is the difficulty and expense of identifying online infringers so that they can be pursued in court. Today, expensive “John Doe” court proceedings must be initiated to obtain this information; and, in addition to legal fees, service providers have asserted their entitlement to onerous administrative charges of up to HK\$50,000 (about US\$6,400) per subscriber. The draft Code not only does nothing to expedite the identification of online infringers, such as by encouraging service providers to respond to right holder requests for such information; it 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. Indeed, so long as it remains, it is difficult to see how the Code would represent any improvement over today’s informal notice and takedown practice, in which most service providers respond reasonably promptly to most takedown requests involving infringing material that they host.

IIPA appreciates that the revised Code of Practice requires records of notices received and processed to be preserved for 18 months, but we 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. It could also represent a step backward from the status quo.

While Hong Kong courts generally impose appropriate sentences in piracy cases, the disturbing trend of excessive leniency in cases involving uploading of infringing materials to the Internet continued in 2012.<sup>6</sup> The outcomes in two more cases in the Magistrates' Court dealing with infringing uploads to cyberlocker sites resembled those in several cases the preceding year: 120 hours of community service was imposed on one offender, while the other was acquitted. This appears to violate clear guidelines from the Court of Appeal, in the case of *Secretary for Justice v. Choi Sai Lok*<sup>7</sup> and from the Court of Final Appeal in *HKSAR v. Chan Nai Ming*.<sup>8</sup> Those guidelines provide that custodial sentences should be imposed in copyright piracy cases, even those in which a commercial motivation or financial gain to the defendant cannot be proven, unless "truly exceptional circumstances" are present. IIPA urges Hong Kong courts to issue additional guidelines to assist trial courts in imposing consistent, proportional and deterrent penalties for online copyright offenses in Hong Kong. Further training for prosecutors regarding copyright licensing regimes and the scope of various licenses in place in Hong Kong is also needed, along with improved communication between prosecutors and licensing bodies.

Finally, the outstanding efforts in 2012 of Hong Kong Customs and Excise Department (HKC&E) in recent cases involving major piracy sites, as well as continued efforts to combat hard goods piracy, deserve commendation. Publishers commend the HK C&E's consistent efforts against copy shops, conducting numerous raids and pursuing these cases of book piracy through to conviction; many infringers have received jail time and/or significant fines as a result. This agency also played a critical role in the January 2012 shutdown, led by the FBI, of the leading pirate site MegaUpload, raiding offices, domestic premises, and luxury hotel suites in Hong Kong and freezing millions of dollars in Hong Kong-based assets of the MegaUpload conspirators. In June, HKC&E collaborated with their counterparts in the Macau Customs Service to seize the servers of the forum site Fdzone.org, which had for years enabled its more than 280,000 paying subscribers to download infringing music, movies, games and software. Macau authorities made further seizures of assets and arrested four ringleaders, three of whom are being prosecuted in Macau for unauthorized provision of protected works as well as money laundering. Finally, we applaud HKC&E's efforts to establish a research and development laboratory to conduct training and research to strengthen investigations of online piracy cases.

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<sup>6</sup>More traditional piracy schemes do receive significant sentences, even if they involve the Internet. MPAA reports that a defendant was sentenced by District Court to ten months imprisonment for making and selling infringing physical copies of U.S., Japanese and Hong Kong movies via a website.

<sup>7</sup>[1999] 4 HKC 334.

<sup>8</sup>[2005] 4 HKLRD 142; [2007] 1 HKLRD 95; [2007] 2 HKLRD 489.

# MALAYSIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA files this Special Mention report on Malaysia to note both the accomplishments and the remaining challenges ahead for the government of Malaysia in the protection of copyright.<sup>1</sup>

**Executive Summary:** The Malaysian government has been responsive to many of IIPA's concerns over the years. Partly in recognition of passage by the Malaysian Parliament of the Copyright (Amendment) Act 2010 (amending the Copyright Act of 1987), and noting continued concerns, Malaysia was removed from the Watch List. In its announcement, USTR noted the amendments "include provisions on: preventing the circumvention of technological protection measures; establishing a mechanism for cooperation by Internet service providers (ISPs) against piracy over the Internet; and prohibiting the unauthorized camcording of motion pictures in theaters," and noted that "The United States will continue to work closely with Malaysia to ensure that progress is sustained and to address our remaining areas of concern, including through the Trans-Pacific Partnership negotiations." Malaysia joined the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) effective December 27, 2012, and appeared on the road to effectively address copyright protections in the digital and online environment, except enforcement efforts waned in 2012. The changes in Malaysia are already having a positive commercial effect, including on local copyright-based businesses.<sup>2</sup>

### PRIORITY ACTIONS REQUESTED IN 2013

#### Legislation, Market Access

- Implement fully the Copyright (Amendment) Act 2010 (amending the Copyright Act of 1987), e.g., clarifying coverage of access control technological protection measures (TPMs), as well as other important clarifications.
- Make further changes to create a structure to hold landlords and mall owners liable when they are aware of (or have constructive knowledge of) piracy activities on their premises and continue to allow such illegal activities.
- 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.
- 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.

#### Enforcement

- Address Internet and mobile/handheld device piracy in a more systematic and deterrent manner.
- Address mall and street piracy by ensuring effective enforcement by the Ministry of Domestic Trade, Co-Operative & Consumerism (MDTCC) enforcement division, including on an *ex officio* basis and without Malaysian Administrative and Diplomatic Service (MADS) involvement.
- License all legitimate optical disc dealers in all night markets, and close down unlicensed dealers and those who sell pirated materials and unstickered product, including in the night markets.
- Make a renewed push for universities to adopt policies that mandate the use of legitimate copies of books and other copyright materials.

<sup>1</sup>For more details on Malaysia's Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2013SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

<sup>2</sup>During the last year, platforms created by the local satellite TV station, ASTRO, began offering pay-per-view of U.S. content companies as well as local Malaysian movies after the movies have run their course in the local cinemas.



- Put greater focus on: 1) addressing enterprise end-user software piracy; 2) implementing a government-led software audit initiative and have these audit reports filed with the Companies Commission of Malaysia and the Enforcement Division; 3) implementing software asset management to drive the use of legal software in the corporate sector; 4) training programs targeted at senior management of companies; and 5) public awareness campaigns to highlight the damages caused by piracy to creativity and innovation and to the growth of the IT industry.
- Enforce the Trade Descriptions (Optical Disc Label) Order 2010, following up with prosecutions leading to deterrent sentences against those who fail to use stickers on pirate product.
- Assign more dedicated judges to the Criminal IP courts, and establish the promised 15 Sessions courts around the country to reduce backlogs and obtain convictions publicized in the media as a form of deterrent.

## **COPYRIGHT LAW AND RELATED ISSUES**

Copyright protection in Malaysia is governed by the Copyright Act, 1987, as last amended by Copyright (Amendment) Act 2010 in December 2011 (in force April 2012). IIPA commends the government for enacting copyright reforms to implement the WCT and WPPT, and to introduce important protections and enforcement remedies, which 1) prohibit the camcording of a motion picture inside a cinema, 2) prohibit the circumvention of TPMs (both the act of circumvention and trafficking and servicing in circumvention technologies, devices, and components), 3) contain key components of a workable notice and takedown system in Malaysia, and 4) provide the possibility of court ordered remedies against rogue websites and repeat infringers in the online environment. Malaysia also joined the WCT and WPPT effective December 27, 2012. These are notable achievements in the area of legal reform. Along with Malaysia's participation in negotiations toward a broad-based regional Trans-Pacific Partnership (TPP) agreement, the signs point to a modernized regime for the protection of creative content in years to come. This said, there remain some important missing ingredients of a fully modernized statute which should be accomplished now, whether through implementing regulations or further technical or minor amendments.<sup>3</sup> The following list should be considered non-exhaustive.

- **Coverage of Access Controls:** One issue left unclear by Section 36A of the Copyright Act (the anti-circumvention provisions) is the coverage of access controls, as required by the WCT and WPPT and consistent with international best practices. Access controls are integral as enablers of new business models for the dissemination of creative content. Under the current Malaysian legal framework, it could be argued that both access and copy controls are covered, since 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” [emphasis added]. However, Section 3 defines 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,” a standard that seems to tie the TPM to “infringement” which may not cover all access controls. Since Section 36A stands alone from the definition of TPM in Section 3, there is a possible argument that Section 36A(1)(b) could prohibit the act of circumvention of an access control. It provides, “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. The same reasoning could apply to the trafficking provisions (Section 36A(3)), but this should also be clarified. Since the prohibition on trafficking refers to the “circumvention” 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 would be covered.

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<sup>3</sup>Three regulations went into force in 2012: 1) *Copyright (Licensing Body) Regulation 2012*, effective June 1, 2012, at <http://malaysianlaw.my/legislation/copyright-licensing-body-regulations-2012-22944.html> (setting forth some basic rules as to the establishment of a copyright licensing body); 2) *Copyright (Voluntary Notification) Regulations 2012*, effective June 1, 2012, at <http://malaysianlaw.my/legislation/copyright-voluntary-notification-regulations-2012-22946.html> (setting forth basic rules regarding voluntary notification and registration practice); and 3) *Copyright (Copyright Tribunal) Regulations 2012*, September 1, 2012, at <http://malaysianlaw.my/legislation/copyright-copyright-tribunal-regulations-2012-23360.html> (dealing with rules related to adjudication of certain permitted licenses under the law). Unfortunately, no regulations regarding addressing ISP liability issues have been issued.

To the extent this 1) was not the intention of the drafters (which according to some within the Malaysian government seems to be the case), and/or 2) cannot be clarified in implementing regulations in an explanatory memorandum, it may be necessary to make a technical amendment to Section 3 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.”

- **Temporary Copy Protection:** Section 13 of the Copyright Act 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 better if this was made explicit in the definition of “reproduction” in Section 3 of the Act. It would be important to clarify in implementing regulations that the Section 13 exception is only operable to the extent it neither conflicts with a normal exploitation of the work nor unreasonably prejudices the legitimate interests of the right holders, consistent with the Berne Convention three-step test (and TRIPS Article 13). It is also important to confirm in implementing regulations 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. It is finally unclear what the term “utilization” encompasses but it appears to be overly broad. It would be important to narrow this concept in implementing regulations.
- **Statutory Damages:** One of the very positive achievements of the recent amendments is that statutory damages are available in the amount of MYR25,000 (around US\$8,100), up to MYR500,000 (US\$162,000). It is important that implementing regulations confirm that, by procedure, the plaintiff is able to elect statutory damages, and that, for example, each sound recording is to be considered “one work” for the purpose of statutory damage awards. A “collective work” is defined in new Section 37(10)(b) of the Copyright Act as “a work in which relevant materials, constituting separate and independent works in themselves, are assembled into a collective whole.” It is assumed therefore 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 in implementing regulations.
- **Civil Damages – Innocent Infringer:** Section 37(6) of the amended Copyright Act 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.” We believe this change should be reconsidered in the future, but for the time being, it is important for implementing regulations to confirm that the innocent infringer defense applies only when the “*infringer sustains the burden of proving, and the court finds*” that the infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright. This is particularly important as it applies to remedies for circumventing TPMs, since statutory damages are expressly excluded as a remedy.
- **Service Provider Liability:** The Copyright Act (as amended) now encourages the active cooperation of ISPs with right holders to prevent the use of networks for the commission of infringing acts, and includes a court-ordered mechanism to halt online infringements.<sup>4</sup> The law addresses (in Sections 43B through 43I) provisions related to service provider liability for various infringing activities occurring over its services.<sup>5</sup> It is important for

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<sup>4</sup>One provision the amended Act 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.

<sup>5</sup>It is noteworthy that the Malaysia-Japan Economic Partnership Agreement, which was signed by both Prime Ministers on 13 December 2005 in Kuala Lumpur and came into force on 13 July 2006, contains in Article 122 (2), the following obligation by which Malaysia is now bound:

Each Country shall provide for appropriate measures concerning limitations on liability for service providers:

implementing regulations: 1) to explain that “notice” includes either actual knowledge or red flag notice, i.e., that the duties to cooperate are triggered by a compliant notice or if the service provider knows or is aware of facts and circumstances from which the infringement is apparent; 2) to confirm that injunctive or other equitable relief is preserved as to a service provider that does not cooperate; and 3) to require ISPs to have in place a fair and effective termination 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. It is also important to revisit the “48-hour” rule for takedowns, which would be too slow for “pre-release” materials (movies, music, games, software, or published materials not yet available in Malaysia). For such materials at least, and for which the automated takedown technologies exist, takedown timeframes should be immediate or no longer than a couple of hours.

- **Recovery of Costs and Attorneys Fees (a TRIPS requirement):** It would be important to identify provisions in Malaysian law providing for the recovery of costs and attorneys fees, which is a TRIPS requirement.
- **Presumptions:** It is important to confirm that presumptions in the law exist as to copyright subsistence and ownership. Section 42 (which states that an affidavit or statutory declaration is *prima facie* evidence of facts contained therein) should create a presumption and the burden of proof of ownership or subsistence should shift to the defendant. Statutory declarations of ownership and subsistence should not be 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.” The “true copy” requirement should be discarded as 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.
- **Term of Protection:** The Copyright Act should be amended to provide a copyright term of “life plus 70” for authors, and 95 years from publication for subject matter for which the term is calculated on the basis of the date of publication. This would comport with the international trend and avoid any trade discrimination against Malaysian authors and creators in the future by avoiding the Rule of the Shorter Term being imposed to shorten Malaysian term overseas. Studies have shown that extending term in line with the international trend leads to greater investment and output in creativity.

IIPA remains disappointed about issues left out of the law, and notes that these should be marked for future consideration: 1) a provision imposing landlord liability (it is highly unfortunate that a draft provision holding landlords liable for providing premises to tenants who infringe was removed prior to passage);<sup>6</sup> 2) mandatory minimum jail sentences for piracy and/or sentencing guidelines to ensure imposition of deterrent sentencing; 3) a provision to deem infringing, in civil and criminal cases, the “possession and control” of infringing copies; and 4) allow the filing of civil actions based on information gathered during criminal anti-piracy operations conducted by law enforcement agencies.<sup>7</sup> The government has also reportedly indicated an interest in dealing more generally with cybercrime, and thus should look to join and implement the Council of Europe Cybercrime Convention.<sup>8</sup>

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(a) in case where a service provider provides a necessary deterrent to the transmission of information through telecommunication systems or networks controlled or operated by the service provider which it believes to be the infringement of copyright or related rights; and

(b) in case where the infringement of copyright or related rights occurs by the transmission of information through telecommunication systems or networks controlled or operated by a service provider and where the service provider is technically unable to deter the transmission or has difficulty in finding the infringement of copyright or related rights.

<sup>6</sup>Five known civil actions were 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.

<sup>7</sup>Section 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,

**Employ Organized Crime Legislation:** With the involvement of organized criminal syndicates in certain piracy operations in the country, the Malaysian government should employ more strategically the Anti-Money Laundering and Anti-Terrorism Act of 2001 in cases involving copyright infringement.<sup>9</sup> 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 should also ensure that the prosecution of pirates under either one of these Acts receives sufficient media coverage as a means of deterrence.

**Make Necessary Changes to Optical Discs Act and Ancillary Regulations:** The Optical Discs Act could be improved to address the changing situation in Malaysia,<sup>10</sup> 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 source identification (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.

## **PIRACY UPDATES IN MALAYSIA**

**Internet and Mobile Device Piracy Worsens in Malaysia:** Malaysia boasted 17.7 million Internet users (60.7% of the population) by the end of 2011, according to ITU, with more than 2.1 million fixed broadband connections.<sup>11</sup> With more than 36.6 million cellular subscriptions, Malaysia has now well exceeded 100% penetration in the mobile market.<sup>12</sup> Of those, well over 10 million are 3G subscribers and many more are accessing the Internet via their mobile devices.<sup>13</sup> Faster and more readily available broadband Internet means increasing online infringement of copyright content, including deeplinking sites, cyberlockers, streaming sites, direct downloads (e.g., of mp3s), P2P filesharing, BitTorrent file sharing, auction sites, advertising sites (for hard goods sale or delivery), infringing use of “blog spots” or social networking sites.<sup>14</sup> For example, the local music industry has complained about *jiwang.org* which is massively infringing local Malay repertoire, but the site remains in operation despite repeated complaints to the Malaysian Communications and Multimedia Commission (MCMC). 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

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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.

<sup>9</sup>Government Looking Into Ways To Tackle Cyber Crime, Bernama, January 17, 2011, at <http://kpdnkk.bernama.com/news.php?id=557241>. According to the article, the Malaysian Deputy Home Minister has indicated the government is “looking into amending relevant legislation to tackle cybercrime.” The Council of Europe Cybercrime Convention contains, in Article 10, “Offences related to infringements of copyright and related rights,” an obligation to “adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the infringement of copyright [and related rights] ... where such acts are committed wilfully, on a commercial scale and by means of a computer system,” and Article 11 contains the obligation to “establish as criminal offences under its domestic law, when committed intentionally, aiding or abetting the commission” of Article 10 offenses.

<sup>9</sup>Other laws, such as those criminalizing fraud, tax evasion, false documentation or names and addresses, should also be brought to bear in piracy cases to address the organized crime/IP nexus in Malaysia.

<sup>10</sup>Industry reports there are now only about 20 licensed optical disc plants in 2012.

<sup>11</sup> International Telecommunication Union, *Fixed Broadband Subscriptions 2000-2011*, at <http://www.itu.int/ITU-D/ict/statistics/material/excel/Fixed%20broadband%202000-2011.xls>, accessed on January 10, 2013.

<sup>12</sup>International Telecommunication Union, *Mobile-cellular Telephone Subscriptions per 100 Inhabitants 2000-2011*, at <http://www.itu.int/ITU-D/ict/index.html>, accessed on January 10, 2013.

<sup>13</sup>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/>.

<sup>14</sup>Internet-based piracy harms independent film producers since it prevents the establishment of legitimate online distribution platforms and services for consumers, which independent producers may use to finance future productions. For independent producers who license content country-by-country, online piracy can lead to high piracy rates in-country, but also raises the threat of exporting the same to other markets instantly. The independent 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.

found their way into Malaysia (as well as Hong Kong, Taiwan and Singapore).<sup>15</sup> Piracy over mobile devices has grown in Malaysia, including over mobile phones, tablets, flash drives and other mobile technologies. These devices can either be pre-loaded with illegal content before being sold to customers, or customers can directly download infringing content. Many fixed locations engage in unlawful uploading/downloading of full tracks of music and ringtones, both wireless and through over-the-counter sales. Publishers report some downloading of reference books and dictionaries onto mobile devices. It is estimated that about 1,000 fixed locations nationwide are still selling illegal music.

**Hard Goods Piracy Harming Domestic Market:** Hard goods piracy continues to harm copyright owners in Malaysia. Such piracy includes distribution of mostly burned-to-order recordable discs (CD-Rs and DVD-Rs) but also some imported factory discs (mainly produced in and imported from China) available at certain retail urban “hot spots” well known to authorities, such as Klang Valley (e.g., in Bangsar, Sri Hartamas, Petaling Jaya, Damansara, Mont Kiara, and Shah Alam), Penang (e.g., Perangin Mall), Johor Bahru (e.g., Holiday Plaza) mostly serving Singapore buyers,<sup>16</sup> and Georgetown, Penang, and Kedah in the north of Malaysia. Retail pirates remain active in several fixed premise locations despite numerous raids. Night market (*pasar malam*) piracy stalls continue to flourish in different locations in Malaysia, have grown beyond the control of the authorities, and there is evidence of organized criminal behavior protecting pirate traders from law enforcement.

**Book and Journal Piracy Continues to Harm U.S. Publishers:** Rampant unauthorized photocopying on and around university campuses continues to cause harm to publishers in Malaysia. Pirates print, photocopy, or “clone,” meaning they print-on-demand directly from high-quality soft-copy scans of physical books, which are then printed on high-quality paper and include high-quality covers, making detection and identification of infringement more difficult. Very few copy shops keep stocks of unauthorized copies on hand. In many instances, the copy shops have been the subject of previous enforcement actions by the MDTCC but due to the lack of follow-on actions by law enforcement and the lack of any deterrence, the shops simply re-engage in the illegal production or printing of unauthorized copies. Publishers continue to actively enforce their rights in the market and appreciate the assistance of MDTCC. However, there continue to be enforcement practice inconsistencies among MDTCC offices. For instance, some offices will seize the photocopying machines in a shop where unauthorized copies of books (whether fully or partially assembled) are found, while others simply leave the machines allowing the shop operators to continue their infringing activities unimpaired. 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 also reportedly on the rise, with students claiming that certain titles are available either for download or for copying (even from their university library).

**End-User Software Piracy and Hard-Disk Loading in Malaysia:** The software industry reports a continued, but slowly declining rate of piracy in Malaysia. For 2011, the software piracy rate was 55%, representing a commercial value of unlicensed software of \$657 million.<sup>17</sup> This includes the use of unlicensed or under licensed software in the workplace in Malaysia and the installation in new computers of pirated software, so-called hard-disk loading. Reducing piracy would bring benefits to Malaysia in terms of added growth, tax revenues, and jobs.<sup>18</sup> BSA |

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<sup>15</sup>Media boxes found to facilitate accessing to infringing contents include AsiaBox and TVBox.

<sup>16</sup>Holiday 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 pirated or counterfeit products that are hard to find in Singapore due to Singapore’s more effective IP enforcement regime.

<sup>17</sup>BSA | The Software Alliance’s 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Malaysia was 55%, representing a commercial value of unlicensed software of well over US\$657 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

<sup>18</sup>A 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.

The Software Alliance has consistently reported excellent working relationships with the MDTCC. In 2012, the MDTCC assisted BSA and its members in conducting 53 corporate end-user actions. While the value of the infringing software found from these raids was around US\$2.9 million, it is worth noting that the majority of companies raided were found to be under-licensed as opposed to having no licenses at all, an improvement from what BSA had found in previous years and early signs of deeper awareness of IPR issues in the software space. However, there remain many companies that still use pirated software who believe raids will never happen to them given that they have not yet been subject to one. It is therefore crucial for Malaysia to develop new strategies to tackle piracy in these “hard core” companies. Strategies such as making mandatory software audits a part of yearly annual financial report filing would likely create an impact in the corporate sector that would significantly reduce software piracy.

Hard-disk loading is often overlooked because it is a B2C deal between the computer vendor and its customer. However, the impact of this form of piracy has far-reaching effects on the legality and security of computers belonging to corporate buyers, and even government agencies and consumers, since the security of the software is often compromised. Malaysia needs to address this issue seriously with IT malls, computer vendors and computer makers to ensure only computers installed with genuine software are distributed and sold. In view of the security risks associated with pirated software and the rampant issue of hard disk loading, we urge the Malaysian government to conduct internal software audits to ensure they have not fallen prey to software pirates themselves and are using only licensed software. The software industry believes some government agencies continue to use unlicensed software in the course of their work and wants to work closely with the government to resolve this problem.

## **ENFORCEMENT UPDATES IN MALAYSIA**

**Downturn in Online Enforcement:** In contrast to 2011, in which MCMC disabled access to many notorious piracy websites,<sup>19</sup> and in which a number of other websites found to be hosted within local Malaysian networks supplying pirated product were taken down as a result of complaints being lodged by right holders, in 2012, almost all positive action against online piracy halted. In part this development is due to a public backlash accusing the Malaysian government of over-regulating the Internet, making them wary of taking similar actions against other rogue websites as well as putting up new conditions for addressing sites that are hosted locally. In part, we understand that the cessation of activities is due to the upcoming General Election. Either way, the takedown rate for locally hosted websites worsened in 2012, with one industry reporting only one site voluntarily shutting down after being notified, and the recording industry reporting a 69% takedown rate (39 out of 49 websites). Further, while the Copyright Act is now in force with new ISP provisions, unfortunately, the IP Office of Malaysia (MyIPO), which is responsible for the operation of the ISP provisions, has yet to finalize an operational process between right holders and ISPs. In the absence of clear rules, the inability to obtain information about a website’s owner is a primary enforcement impediment for addressing Internet piracy in Malaysia. The Malaysian government has agreed to organize a first meeting between right owners and ISPs in the month of March 2013 to seek to resolve these issues.

**Still No Resolution of Night Market Piracy:** As has been noted in many previous IIPA reports, the Ministry of Local Government and Housing, the Kuala Lumpur City Council (DBKL), and other like local councils and authorities, are ultimately in charge of licensing night market vendors. They, working with MDTCC, have not succeeded in eradicating piracy therein. IIPA recommends that the market situation be altered by granting trading licenses to all legitimate optical disc dealers at “night markets,” which would weed out unlicensed illegal traders.

**MDTCC/Prosecutors’ Standard Procedures Needed; More Proactive Police Assistance Would be Helpful:** The industries note very good cooperation of the MDTCC Enforcement Division (ED). Some report that MADs officers continue impeding MDTCC enforcement functions, but generally this appears to be to a lesser effect. Some industries report continued difficulties in MDTCC enforcement practices. For example, the publishing industry

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<sup>19</sup>The sites for which access was disabled included *warez-bb.org*, *thepiratebay.org*, *movie2k.to*, *megavideo.com*, *putlocker.com*, *depositfiles.com*, *duckload.com*, *fileserve.com*, *filetube.com*, and *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.

reports that MDTCC officers lack standard procedures for enforcement investigations; however, drafting of such procedures is in the works. Other problems include requiring statutory declarations prior to book piracy raids, failing to time raids during the first two weeks of each school session, failing to run simultaneous raids, and requiring that photocopying machines be in actual use for illegal photocopying at the time of raid as a prerequisite for seizure of pirate materials and the machines. Others note problems in investigative issues, particularly when there are complicating factors, such as tracking down infringers, dealing with forensic evidence, dealing with evidence of online piracy or identifying online pirate operations, or following the chain of evidence of organized crime or other criminal involvement. Similar issues exist when cases are then brought forward to the prosecutor's office for criminal consideration. Industry also reports that in 2012, the Malaysian Police, notably the Commercial Crime Division, has largely ceased anti-piracy activities except in major cases involving optical disc plants and major distributors, leaving MDTCC as the principal enforcer. They reportedly believe copyright matters are not police priorities.

**Very Little Done to Legalize Publications at Schools/Universities:** In 2011, U.S. publishers, in cooperation with MDTCC, hosted an anti-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. MDTCC has expressed open willingness 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 general awareness-raising campaigns of IP rights (including distribution of public awareness information) and at one point, MDTCC officer visits speaking on the importance of copyright at university campus orientation events, 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.

**Enforce Stickers Program (Being Mindful of Costs to Legitimate Right Holders):** 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. One benefit that could accrue to right holders is the seizure of non-stickered pirated product on the basis of the law.<sup>20</sup> In 2010, the Trade Descriptions (Optical Disc Label) Order 2010 was issued (effective May 7, 2010) by MDTCC, enhancing their hand against those 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. The Malaysian government should fully enforce the 2010 Order against pirates who continue to evade the sticker requirement.

## **MARKET ACCESS AND RELATED ISSUES**

**Mandatory Filming Scheme Hurts Local Film Industry:** In April 2012, the local National Film Development Corporation (FINAS) introduced a mandatory requirement for cinemas to screen two local movies per week. The measure backfired, as the local movie industry suffered a box office decline despite more local films having been released in 2012 than in 2011. The mandatory filming scheme did not help. In the end, mandatory filming schemes such as the one employed in Malaysia in 2012 will fail. Rather, market forces should be allowed to determine the success of movies in the Malaysian market henceforth.

**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.

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<sup>20</sup>Right holders have done their best to comply with the Order, incurring the additional costs associated with stickered legitimate product.

**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.

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

Negotiations continue toward a high-standard, broad-based Trans-Pacific Partnership trade agreement, begun in 2009.<sup>21</sup> IIPA has submitted public comments to the U.S. government's Trade Policy Staff Committee which describe in greater detail the hoped-for results of a TPP negotiation, including a high-level IP chapter, high-level substantive copyright protection, high-level enforcement standards, provisions ensuring the free flow of electronic commerce products and services, and obligations to open markets to trade in copyright goods and services.<sup>22</sup> 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 continued economic stabilization in line with the Administration's goals.<sup>23</sup> On November 10, 2010, IIPA filed detailed testimony, which it delivered on November 19, 2010,<sup>24</sup> strongly supporting Malaysia's participation in the TPP.

## **TRAINING AND PUBLIC AWARENESS**

The copyright industries once again demonstrated their resolve and commitment to assist the Malaysian government with training activities and copyright awareness in 2012. The local motion picture industry helped develop an educational video on how movies are made that was produced locally and featured local artists and people from the local industry to talk about the various jobs that are performed in creating a film. The industry is working with the Ministry of Education to get DVDs to 2,500 schools in Malaysia. The local Motion Picture Association undertook over 15 anti-camcording training sessions for cinema staff operators involving more than 400 cinema employees in total during 2012. In addition, in October 2012, the local industry participated in a "Training Workshop on The Identification of Counterfeit and Pirated Product" for 40 attendees including Royal Malaysia Customs Officers, MDTCC Officers, the Executive Director of the IPR Business Partnership, and senior counsel for major brand protection companies and major brands. The training provided intelligence on how to identify counterfeit or pirated product in both the physical and online markets.

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<sup>21</sup> 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>. In 2012, Canada and Mexico joined the TPP negotiations, bringing the total number of countries to eleven, including in addition Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore, the United States, and Vietnam.

<sup>22</sup> International Intellectual Property Alliance, *Public Comment Concerning the Proposed Trans-Pacific Partnership Free Trade Agreement with Singapore, Chile, New Zealand, Brunei Darussalam, Australia, Peru and Vietnam*, 74 Fed. Reg. 66,720 (December 16, 2009). See also International Intellectual Property Alliance, *"Participation of Malaysia in the Trans-Pacific Partnership Trade Negotiations" IIPA Request to Testify and Testimony Regarding "Negotiating Objectives With Respect to Malaysia's Participation in the Ongoing Negotiations of a Trans-Pacific Partnership (TPP) Trade Agreement,"* 75 Fed. Reg. 64778 (October 20, 2010).

<sup>23</sup> We note that the Korea-U.S. Free Trade Agreement went into effect on March 15, 2012, and that agreement provides a strong starting point for an enhanced TPP agreement consistent and co-extensive with previous FTAs.

<sup>24</sup> International Intellectual Property Alliance, *"Participation of Malaysia in the Trans-Pacific Partnership Trade Negotiations" IIPA Request to Testify and Testimony Regarding "Negotiating Objectives With Respect to Malaysia's Participation in the Ongoing Negotiations of a Trans-Pacific Partnership (TPP) Trade Agreement,"* 75 Fed. Reg. 64778 (October 20, 2010).

# MALTA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR actively monitor developments in Malta during 2013 with respect to the issues discussed in this Special Mention report.

**Executive Summary:** The rate of software piracy in Malta is far above the average in Western Europe, and the local software industry reports mounting difficulties in enforcement that undermine efforts to keep this form of piracy at bay. Criminal cases of software piracy are not initiated by Malta's overburdened police, preventing these cases from working their way through the court system to deterrent sentencing. Further, Malta's legislative framework requires a few relatively minor, though crucial, revisions in civil and criminal law provisions to permit rights holders and police to carry out effective cases against software copyright infringements. Strong governmental support and collaboration is needed to raise awareness in the country on the importance of respecting intellectual property rights. According to BSA | The Software Alliance's (BSA) 2012 Global Software Piracy Study, in 2011, the piracy rate in Malta was 43% (while the average in Western Europe was 32%), and the commercial value of pirated software was US\$7 million.<sup>1</sup>

**Enforcement:** The Economic Crimes Unit of the Police force is responsible for enforcement against crimes related to fraud and intellectual property infringement, including copyright violations. However, the few police inspectors and support personnel who make up the Unit are overburdened by their current workload. The vast majority of criminal prosecutions taken to court are those involving ordinary business fraud, such as misappropriation of money. Police inspectors and their staff are not sensitized to the economic and security risks involved in software piracy, and their failure to bring criminal cases in this field has prevented any meaningful progress in tackling this serious problem. The police force in Malta should establish a dedicated IP Unit, charged with the enforcement of the IP-related provisions that are found in the Maltese Criminal Code. Such a Unit could be set up in a similar manner to the Police Cyber Crime Unit (which has been very successful since its creation a few years ago) and the IPR Unit within the Enforcement division of Maltese Customs.

Police are also unable to take *ex officio* actions in cases of criminal copyright piracy in Malta, including situations when unlicensed software is loaded on the hard drive of a PC offered for sale (known as hard disk loading), due to a procedural requirement in the law that investigations may only commence at the initiation of the copyright owner, who must file a complaint in writing with the Police, addressing the violation in question and demanding Police intervention. As a result, police are unable to respond to leads regarding copyright cases, further weakening their effectiveness in this problem area.

**IP Awareness:** BSA has made several proposals to the Maltese Government in 2012 for programs to raise awareness among the general public and government officials of the need to acquire and make use of legitimate software licenses. While government officials have been receptive to the ideas raised in several meetings with BSA, to date the Government of Malta has taken no formal action to implement a much needed awareness campaign on this topic.

**Legislation:** The Criminal Code of Malta contains a number of deficiencies that inhibit effective enforcement of copyright for the software sector. The provision in the Criminal Code that applies to copyright infringement (Article 298B) is unclear as to whether it may be invoked in situations of end-user piracy of software

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<sup>1</sup>BSA | The Software Alliance's 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Malta was 43%, representing a commercial value of unlicensed software of US\$7 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA's 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.



committed by companies in their business activities. Although the provision has been successfully invoked over the years in a small number of criminal prosecutions concerning piracy that took place in the ordinary channel of trade (such as hard disk loading cases), Article 298B of the Criminal Code has never been tested in cases of business end-user copyright violations, in particular, due to its vague language. Revisions are needed to provide more certainty on this issue. Further, Malta's law does not properly implement its obligation under the WTO TRIPS Agreement to provide a commercial scale threshold for intellectual property infringements in its domestic law. There is also a need to revise and increase the existing penalties available under Article 298B to bring these on par with the penalties available for other intellectual property crimes, such as criminal trademark or design infringement. BSA has made a number of proposals to the Maltese Government to address these and other deficiencies in the Criminal Code.

From a civil law point of view, the Maltese Copyright Act allows the owner of copyright, in situations of copyright infringement, to enter a demand for the payment of damages, or of lost profits, together with additional damages in situations of flagrant infringement of copyright. However, there is a problematic deficiency in Malta's Copyright Act, as it fails to provide for civil *ex parte* searches. This long-standing legal deficiency has made it extremely difficult for software companies to preserve the required evidence of copies of infringing software in the possession of the infringing party, without which a successful action cannot be instituted in a court of law. Article 50(2) of the TRIPS Agreement requires WTO members to ensure that their national courts are authorized to take provisional measures, when appropriate, without having to hear the defendant (such as *ex parte* searches), in particular where any delay would cause irreparable harm to the rights holder. This obligation is also incorporated into the EU IPR Enforcement Directive, but Malta failed to adopt civil *ex parte* search warrants or similar procedures during its implementation of that Directive. Instead, the procedural remedies currently available under the Maltese Code of Organisation and Civil Procedure are outdated and insufficient to allow for effective gathering of evidence in software piracy cases. The present remedies also require rights holders to deposit substantial fees in the form of guarantees to initiate enforcement activities, which can in practice prevent right holders from taking action in Court.

These civil and criminal law gaps, though few, have created real obstacles to proper enforcement in cases of software piracy in Malta, and should be revised to ensure that rights holders have the needed tools to address growing concerns with the piracy rate in the country.

# MOLDOVA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that the U.S. Government actively monitor developments in Moldova during 2013 with respect to the issues discussed in this Special Mention report.

**Executive Summary<sup>1</sup>:** Several copyright industries, including in particular, the 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, especially for the software industry.

In addition to the enforcement concerns, there is one major legal deficiency that needs to be addressed by the Government of Moldova in 2013, because current law violates WTO TRIPS Agreement obligations and the WIPO Performances and Phonograms Treaty (WPPT). The issue relates to a statutory license for making available right for performers and producers of sound recordings under the Moldovan Copyright Law (2010). Instead of an exclusive right of making available as required by the WPPT and an exclusive right of reproduction as required by the WTO TRIPS Agreement, Moldova now permits a statutory license (a mere right of remuneration) for the making available to the public of phonograms; in short, Article 37(1)(d) needs to be amended.

According to BSA | The Software Alliance (BSA), the software piracy rate in Moldova remains among the highest in the world (it was 90% in 2011).<sup>2</sup> One of the hindrances to effective enforcement is the lack of IPR training and experience by the police, prosecutors, and judges, responsible for dealing with copyright enforcement matters. In 2012, the number and size of raids undertaken against suspected infringers decreased for the second year in a row, and, most investigations (cases) were closed without a trial or conviction. This is due, in large measure, to the low levels of understanding and priority given to IPR enforcement in general.

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; while it is still available in Moldova, it is apparently no longer being hosted there. To date, no criminal investigation or case has been commenced against either the owners or operators of this illegal service for its operations in Moldova.

BSA reported that in 2012, no new criminal investigations for software piracy were commenced. BSA further reported, that of the 2011 criminal cases (seven total) commenced:

- Four cases were closed by the police at the criminal investigation stage, without any further action.

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<sup>1</sup>For more details on Moldova’s Special 301 history, see IIPA’s “History” appendix to this filing at <http://www.iipa.com/pdf/2013SPEC301HISTORICALCHART.pdf>, as well as the previous years’ reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA’s 2013 global issues, see our cover letter at <http://www.iipa.com/pdf/2013SPEC301COVERLETTER.pdf>.

<sup>2</sup> BSA | The Software Alliance’s 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Moldova was 90%, representing a commercial value of unlicensed software of US\$45 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.



- Three cases were concluded by court decisions, with varying amounts of fines imposed.

BSA further reported that there were only two new administrative cases opened in 2012 pertaining to software piracy and of these, one resulted in a settlement (with rights holders) and a fine, and the other case is still pending in court.

## **PRIORITY ACTIONS TO BE TAKEN IN 2013**

IIPA recommends that the Government of Moldova address the following legal reform matter in 2013:

- The interactive making available right for performers and producers of sound recordings under the current Moldavian Copyright Law (2010) is in conflict with the WTO TRIPS Agreement (right of reproduction), the WPPT and the EU directives. Instead of an exclusive right of making available as required by the international treaties (e.g., WPPT Article 14), and the right of reproduction under WTO/TRIPS (Article 14), Moldova now provides for a statutory license (a mere right of remuneration) for the making available to the public of phonograms. The Moldovan Copyright Law generally provides for an exclusive right of making available for producers (Article 34(1)(e)) and for performers (Article 33(2)(f)); however, the exclusive nature of this right is voided by Article 37(1)(d) which allows for the use of content online without permission, subject only to the payment of equitable remuneration. This voids the exclusive right in violation of the requirements of the WPPT, and the WTO TRIPS Agreement. To make matters worse, Article 48(11)(d) of the Copyright Law stipulates that the right to equitable remuneration falls under extended collective management undertaken by collecting societies. This defect has been an issue in other countries as well (e.g., Ukraine). Because it is a violation of international treaty obligations, it should be quickly addressed by the Government of Moldova.

IIPA recommends that the Government of Moldova make the following its IPR enforcement priorities in 2013:

- 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. Additionally, this would include an awareness campaign on the risks of end-user piracy, led by the Agency for Intellectual Property Rights Protection.
- 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.

Aside from the one major exception above (making available right), the copyright industries generally report that the Moldavian IPR legal infrastructure is sound (and, for the most part, harmonized with European Union directives). But, as noted, the largest problem in Moldova confronting these industries is the implementation of its laws, and on-the-ground enforcement which 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 no longer a priority for the Government of Moldova as it was only a few years ago (which led to the improved legal reforms); thus, significant investments made by the copyright industries in past training programs for local law enforcement officials are not proving to be fruitful. Thus, despite the good relationships between rights 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 for the past several years. The police lack sufficient resources, equipment and expertise to effectively conduct raids, and the storage and inspection of seized pirated materials remains a major concern for rights holders. In 2012, the police

forces were restructured which further reduced the number and size of raids. One positive note: the Ministry of Internal Affairs recently approved an internal reform strategy which is intended to ultimately improve IPR enforcement.

Another concern is the lengthy court proceedings; as a result, 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.

# PARAGUAY

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA files this Special Mention report on Paraguay to highlight the serious enforcement deficiencies that persist in the country, and that have been major objectives under the U.S.-Paraguay Intellectual Property Rights Memorandum of Understanding (IPR MOU). Despite years of work under this framework, Paraguay unfortunately has failed to: (1) implement a software legalization decree, followed by annual reports of government agencies complying with such a program; (2) significantly reduce the levels of copyright piracy; (3) increase *ex officio* actions at the border; (4) strengthen deterrence by actually imposing mandatory minimum prison sentences on offenders convicted of manufacturing, importing or distributing commercial quantities of pirated or counterfeit goods; (5) provide for the seizure of an infringer's assets upon conviction for commercializing pirate product; (6) find ways to work with the judiciary to promptly resolve pending cases; and (7) increase the terms of copyright protection for all copyrighted materials.<sup>1</sup>

**Executive Summary:** The forms of piracy in Paraguay and the sectors affected by them are wide-ranging. Paraguay is a major source of manufactured and transshipped pirate products throughout the region. Unauthorized copies of software are common in businesses, and the government has taken no steps on its commitment to implement a software legalization program among its agencies. Internet piracy is also beginning to take root in Paraguay, affecting certain sectors in particular. But as surrounding South American citizens are largely moving online for content (bringing new enforcement challenges), Paraguay is still in the nascent stages in the typical progression of piracy from a physical problem to a digital one. Admittedly, Paraguay still in many ways lacks the means for a resource-intensive and robust IPR regime. 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 specifically dedicated to IPR cases. IIPA urges USTR to ensure that Paraguay complies with the baseline commitments that were reflected in the MOU. Continued U.S. Government support and focused leadership within the Government of Paraguay is sorely needed.

### PRIORITY RECOMMENDED ACTIONS FOR PARAGUAY IN 2013

- Implement a software legalization decree, and conduct an audit of public institution software to ensure full compliance (a long overdue obligation from the IPR MOU).
- Facilitate swift and deterrent convictions by ensuring the quality of 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 proactive enforcement actions and encouraging better communication with rights holders in 2013, 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, followed up by prosecution of those responsible.
- Continue to increase actions at the border to control the spread of pirate product across the region.

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<sup>1</sup>For more details on Paraguay's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2013SPEC301HISTORICALCHART.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2013 global issues, see our cover letter at <http://www.iipa.com/pdf/2013SPEC301COVERLETTER.pdf>.



**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 2012, \$61 million worth of Paraguayan goods entered the U.S. under the duty-free GSP code, or more than 36% of Paraguay’s entire imports into the U.S.<sup>2</sup>

## **COPYRIGHT PIRACY IN PARAGUAY**

Few of Paraguay’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 software sector continues to suffer from widespread unlicensed software use by enterprises. The country supplies mass quantities of manufactured and transshipped 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 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. Internet piracy is also beginning to take root in Paraguay, affecting certain sectors in particular.

Paraguay continues to be the biggest supplier of blank media intended for export to Brazil for use with pirated content. Industrial plants operating from Ciudad del Este produce millions of CD-Rs, DVD-Rs and other types of media that cross the border by different means. The Paraguayan government has never conducted serious inquiries into these industrial facilities to identify clients and routes by which the massive production of blank media is smuggled into Brazil, in many cases as personal baggage. CD-R and DVD-R plants established in Ciudad del Este have obtained financial incentives from the Paraguayan government through the law to provide incentives to foreign investors. However, despite all complaints from copyright industries, the Minister of Industry and Commerce (responsible for the incentives) never disclosed detailed information about the commercial operations of those plants, and especially about the local consumption of blank media versus the flagrant smuggling operation established by the operators of the plants in coordination with several companies in Ciudad del Este.

The primary targets for enforcement in Paraguay have long been the markets of Asunción 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 recent years due to Brazilian controls on the Friendship Bridge and at other land transit points on Brazilian routes between Ciudad del Este and São 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.

The prevalence of circumvention devices in Paraguay remains a crucial concern for the entertainment software industry; modchips and game copiers are principally 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. As the September 26, 2012 joint operation of Uruguayan authorities and U.S. agents reveals, 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

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<sup>2</sup>During 2011, more than US\$77 million in imports to the U.S. from Paraguay enjoyed duty-free treatment under the GSP Program, or more than 70% of Paraguay’s entire imports into the U.S.

distributing them throughout South America. In that raid, Uruguayan authorities identified a shipment of containers destined for Ciudad del Este, Paraguay, from Uruguay, containing counterfeit Xbox, PlayStation and Nintendo gaming systems valued at US\$741,041.

The software industry reports a continued high level of software piracy in Paraguay. The software piracy rate was 83 percent in 2011, the same level as the year before, representing a commercial value of unlicensed software of \$73 million.<sup>3</sup> This piracy includes widespread unlicensed software use by businesses and government agencies. Corporations place orders via email to receive pirate software from hired distributors, and PCs customized with illegal pre-installed software are 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 software sector.

Optical disc piracy is still a large-scale problem, distributed directly from warehouses to wholesale buyers. Burned copies of CD-Rs/DVD-Rs full of pirated content 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.

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.

## **COPYRIGHT ENFORCEMENT IN PARAGUAY**

Paraguay's Specialized Technical Unit (UTE) underwent a number of structural changes in recent years that left the copyright industry uncertain that planned training and re-staffing in 2012 could result in renewed effectiveness in its enforcement efforts. To the knowledge of IIPA's members, 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. While the Government of Paraguay maintains border enforcement cooperation efforts with Brazilian, Argentine, and Uruguayan authorities, these have not been effective. Like prosecutors and police units in Paraguay, customs officials lack the motivation to conduct *ex officio* enforcement actions. Within the judicial system in Paraguay, rights holders historically have faced 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 Government of Paraguay has taken no meaningful steps to issue or implement a software legalization program among its agencies, an important obligation under the country's MOU with the United States.

**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.

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<sup>3</sup>BSA | The Software Alliance's 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Paraguay was 83%, representing a commercial value of unlicensed software of US\$73 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA's 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

**Problems Within the Judiciary:** On the whole, the primary enforcement problems in Paraguay are the judicial and administrative personnel involved in the IPR prosecutor's 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 Ciudad del Este, the selection of judges is a lottery system, rather than assignment of IP cases to specialized judges as in the past. A 2010 resolution of the Supreme Court has created 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. 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.

**Landlord Liability for Large-scale Street Piracy:** The copyright sectors report no progress in 2012 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.

**Specialized IPR Prosecutors Units:** To the knowledge of IIPA's members, Paraguay's Unidad Especializada de Propiedad Intelectual (UEPI or 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. The existing IPR prosecutors and an IPR Prosecutor's unit now in place in Encarnación, 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.

A trained and dedicated specialized IPR court that works effectively with specialized IPR prosecutors is badly needed in Paraguay. New courts with exclusive jurisdiction for intellectual property infringements, and a specialized IPR judge with national jurisdiction, would be beneficial for the entire industry, and specialized IPR training for these judges could be offered.

**Supervision and Destruction of Seized Evidence:** In 2010, Paraguay passed penal code reforms that proscribe the distribution of circumvention devices. Some prosecutors, however, have been 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 have often been left in the custody of the defendant, allowing them to be removed and altered. Judges, however, take no notice of the blatant violation of the judicial orders, making prosecution futile.

**Expert Witnesses:** There has been little improvement in the area of experts and judges in Paraguayan courts. Rights holders have experienced problems coming up against expert witnesses that are paid by defendants but have little or no qualifications. The problem is massive and widespread. Judges have had 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.

**Internet Enforcement:** To date there have been very few developments in Internet piracy enforcement. The local Internet service providers (ISPs) are cooperating responsively to protect copyright, but only in the limited circumstances when they are required to provide information by judicial order. Paraguay lacks specific laws 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.

**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. Judges in Paraguay, in particular, are in dire need of training in the importance and operation of intellectual property enforcement.

**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.

## **COPYRIGHT LAW AND CRIMINAL CODE ISSUES IN PARAGUAY**

**Copyright Law of 1998:** 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. At the end of 2012, a bill to increase the term of protection for sound recordings and music performances up to 70 years was submitted to the House. Clear support from the government is needed to prioritize this bill during 2013.

**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.

**Criminal Code Reform in 2008:** After a comprehensive effort, amendments to the Criminal Code 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 and increasing maximum penalties for copyright infringement. The reform also broadened the law's scope to cover more infringing acts, and included 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 leads prosecutors and judges to refuse to seek and issue jail sanctions, instead issuing only fines.

# THE PHILIPPINES

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA files this Special Mention report on the Philippines to denote positive progress in several key areas for protection of creative content warranting recognition, and to otherwise note remaining issues in the country that should be addressed in the coming year.<sup>1</sup>

**Executive Summary:** IIPA members wish to laud the leadership of the Philippine government, Ricardo Blancaflor, Director General of the IP Office of the Philippines (IPO), and Optical Media Board (OMB) Chairman Ronnie Ricketts, for taking novel and effective approaches to dealing with piracy in the Philippines and further modernizing protection. In the past two years, the removal of piracy from Quiapo and markets located in areas like St. Francis Square (Mandaluyong) and Makati Cinema Square (Makati), the passage of the anti-camcording law, the issuance of Supreme Court Rules of Procedure for Intellectual Property Cases, the establishment of administrative enforcement functions of the IP Office (and the availability of injunctive relief), and an MOU between Philippine National Police (PNP) and OMB to remove red tape,<sup>2</sup> all evidence the will of the Philippine government to tackle piracy and create space for legitimate creative business to grow. IIPA hopes that the IP Office of the Philippines and the OMB, the Philippine Anti-Piracy Team (PAPT) including Philippine National Police (PNP) and National Bureau of Investigation (NBI), will work together in 2013 to deal more effectively with unlicensed software use by enterprises (enterprise end-user piracy), book piracy (textbook copying and pirate or counterfeit bestsellers), Internet piracy, and emerging challenges such as “media box” and mobile device piracy. We are also hopeful that the new Supreme Court rules will lead to more effective judicial enforcement including effective search warrants and deterrent criminal convictions.

## PRIORITY ACTIONS REQUESTED IN 2013

### Enforcement

- Finalize amendments to the IP Code (including a landlord liability provision) already passed by the House and Senate, addressing concerns raised in this filing through implementing rules.
- Implement the Rules of Procedure for Intellectual Property Cases (issued in November 2011) 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 and “media box” piracy within its purview.
- Increase the budget of the OMB so it can conduct, in conjunction with the PNP, nationwide enforcement efforts.
- Maintain enforcement efforts, including prosecutions where necessary, under the Anti-Camcording Act of 2010.
- Remedy enforcement bottlenecks, including inquests and preliminary investigations by prosecutors with the Department of Justice (DOJ), 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.

<sup>1</sup>For more details on the Philippines’ Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2013SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years’ reports at <http://www.iipa.com/countryreports.html>.

<sup>2</sup>Under the MOU, the police will be allowed to enforce OMB’s mandate without direct orders from their superiors and jurisdictional issues will be eliminated among different police precincts.



## Legislation

- Ensure that the Copyright Amendment Bill is finalized by the first quarter of 2013.
- Modernize the E-Commerce Act to facilitate removal of infringing material or services from the Internet through an effective notice and takedown system and measures to deal effectively with non-hosted infringements.
- Include CD-R burning, mobile device piracy, “media box” piracy, and border enforcement in OMB’s purview under the Optical Media Act.
- Implement Republic Act 9184 (An Act Providing for the Modernization and Regulation of the Procurement Activities of the Government and for Other Purposes), such that the government will not permit the purchasing of illegal software, and will allow only suppliers of legitimate software to participate in government bidding.
- Ensure that DOJ finalizes IP Manual for Prosecutors and Law Enforcement Agents by the first quarter of 2013.

## 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 UPDATES IN THE PHILIPPINES**

**Enterprise End-User Piracy of Software, Hard Disk Loading, and Unauthorized Use of Software in Internet Cafés:** The use of unlicensed software continued to cause significant revenue losses to the software industry in 2012, thereby stunting the growth of the information technology sector.<sup>3</sup> The software piracy rate actually increased to 70% in 2011, well above the Asia average of 60% and significantly above the global piracy average of 42%. The value of unlicensed software in the Philippines grew to US\$338 million in that same year. A September 2010 study 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.<sup>4</sup> 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. Use of unlicensed software in Internet cafés remains rampant. The Philippines government should conduct audits of all Internet cafés and remove business licenses of those found to allow the unauthorized use of content.

**Unauthorized Use of Software by Government Agencies:** 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 must be implemented to ensure the government refrains from purchasing illegal software and allows only suppliers of legitimate software to participate in government bidding.

**Piracy of Textbooks, Journals, Trade Books:** 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. An additional problem is the 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). Online piracy (e.g., through BitTorrent sites) of medical textbooks,

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<sup>3</sup>BSA | The Software Alliance’s 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in the Philippines was 70%, representing a commercial value of unlicensed software of US\$338 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

<sup>4</sup>See IDC and BSA, *The Economic Benefits of Reducing Software Piracy A Report by IDC*, September 2010, at <http://portal.bsa.org/piracyimpact2010/studies/piracyimpactstudy2010.pdf>, which demonstrated that a reduction in end-user software piracy over four years (2010-2013) of ten percent (from 69 to 59 percent) would result in \$329 million in additional revenue to the GDP, \$30 million in tax revenues, and 1,097 new jobs. A reduction of ten percent in just two years would multiply the positive effects.

professional books, and trade books, is significant, and with growing broadband access likely to increase. 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 (e.g., Recto University) 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. 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. Areas such as Morayta and Paredes Street in Manila are commonly known for photocopying entire books, educational and review materials for professional examinations, as well as selling pirated books and compilations burned onto optical discs (CD-ROMs, DVDs). The publishing industry saw meaningful cooperation with the OMB in 2012. The OMB, with the assistance of the publishing industry, ran two successful enforcement actions (in July and December 2012) against pirate book vendors in the Paredes Street market, seizing over 31 sacks of books and unauthorized compilations of textbooks and review materials (from several different publishers) on CDs, DVDs and CD-ROMs. The OMB’s actions have had a significant impact in raising awareness of book piracy among law enforcement personnel and in the market. The industry will continue to work with OMB and the IPO to address book piracy in the country.

**Internet Piracy a Threat in the Making:** Internet piracy remains an emerging issue in 2012, with Internet penetration nearing 30 million people, but with only 1.7 million fixed broadband connections in the country.<sup>5</sup> Many in the Philippines still access the Internet at Internet cafés. Most Internet piracy experienced in the Philippines is through peer-to-peer (P2P) file sharing services, the BitTorrent file sharing protocol, deep linking sites, blog sites (featuring album cover photos with download links, usually made up of people using fake names and accounts), and one-click hosting sites (cyberlockers) whereby those engaged in piracy on those sites sell passwords to their stored infringing materials.<sup>6</sup> In 2012, the Entertainment Software Association (ESA) reports that the Philippines ranked 16th in the world in terms of the number of connections by peers participating in the unauthorized file sharing of select ESA member titles on public P2P networks.<sup>7</sup> Increasing numbers of sites offer sales of hard goods through the Internet. 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.<sup>8</sup> *Kat.ph* (formerly kickasstorrents), a site with connections to the Philippines (including a mirror site there), 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. This site, reportedly now based in Canada, is notable for its commercial look and feel. The site’s popularity has increased since 2011 and is now ranked by Alexa.com among the top 135 most visited sites in the world, and within the top 40 sites visited in the Philippines, Pakistan and Sri

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<sup>5</sup>International Telecommunication Union, Fixed Broadband Subscriptions 2000-2011, at <http://www.itu.int/ITU-D/ict/statistics/material/excel/Fixed%20broadband%202000-2011.xls>, accessed on January 10, 2013.

<sup>6</sup>We note here that 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. High piracy rates impede or destroy legitimate distribution channels, including the emergence of legitimate online distribution platforms, because it is impossible to compete with free. This significantly reduces licensing fees, which are often relied on to finance 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, independents cannot engage in worldwide same day “day-and-date” releases (which may prove an effective method to curb or delay piracy for the major studios) due to the fact that national distributors release on their own schedule.

<sup>7</sup>ESA’s reporting on P2P activity does not take into account downloads of these titles that occur directly from hosted content, such as games found on “cyberlockers” or “one-click” hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

<sup>8</sup>A 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.

Lanka. *Kat.ph* was cited by IIPA in its filing seeking to identify “notorious markets” for piracy,<sup>9</sup> and on December 13, 2012, the U.S. Trade Representative listed *Kat.ph* as a notorious market.<sup>10</sup>

**Mobile Device Piracy and Some Hard Disk or “Media Box” Piracy Detected:** With mobile penetration exceeding 83 million by the end of 2011 according to the International Telecommunications Union,<sup>11</sup> there are increasing reports of infringing wireless application protocol (WAP) which provide pirate content directly through wireless communications onto mobile phones/devices. These underground businesses feature 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. These shops severely harm copyright industries, especially in an era when physical legitimate sales have dropped precipitously, and legitimate digital sales have not yet caught up.<sup>12</sup> We also have reports that third party gray market hard disk vendors are offering content (movies and music) to be copied on request or on demand onto the hard disks upon purchase or selling “media boxes.”

**Street and Mall Piracy Abating, Especially in Metro Manila:** The closure of the market (and distribution hub) in the Quiapo district of Metro Manila rippled throughout the community in 2011, and IIPA acknowledges the activity of OMB in weeding out piracy in markets located in areas like St. Francis Square and Makati Cinema Square in 2012.<sup>13</sup> Reportedly, Metrowalk will soon be shut down as well. Notwithstanding these positive recent developments in Metro Manila, physical piracy in the Philippines requires continued vigilance, evident in Cebu (in the Visayas group of Islands), Davao (in Mindanao), and Baguio (in Luzon). Hard goods piracy consists of pirated CDs, DVDs, CD-Rs, CD-ROMs, and DVD-Rs, with a mix of imports from China and an increasingly significant percentage of CD-R and DVD-R burning. Sustained raiding has led many who had permanent kiosks and stalls to close their permanent stalls and instead sell on foot, with bags or backpacks containing pirated DVDs/CDs inside, near commercial establishments open 24 hours a day, or set up makeshift tables that can be folded down easily in the event of raids. Also evident are “glass door” pirates, who hide behind mirrored glass doors for customers, or use curtains, false doors, or walls. They open at different times during the day or night to evade authorities. These stalls are not very popular as some people are scared to go inside. With the closure of most hard goods piracy in Metro Manila, there is a concern that Baclaran (a district of Paranaque City, a city located south of Metro Manila) could become a major piracy hub if not controlled. At this stage, the OMB is strictly monitoring the area.

**Remix Piracy:** The music industry has experienced a new form of “remix CD piracy” in 2012 in which vendors outside a popular grocery chain set up a “DJ booth,” which provides entertainment in the form of loud party music attracting shoppers to come to the store. In exchange, they sell illegally manufactured “remix CDs” on the side, in which they take top hits and re-work them into compilations. They do so without any permit to commercially replicate or without any authority of the OMB. With the help of the OMB the industry has organized raids of the vendors and have sent complaint letters to the main office of the grocery chain. Although the enforcement operations were initially successful, particularly in the physical markets, online sales of remixes apparently continue. The industry will continue monitoring this “remix” underground market since they are still presumed to be operating under the radar.

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<sup>9</sup>See International Intellectual Property Alliance (IIPA), *Submission Re: IIPA Written Submission Re: 2012 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 77 Fed. Reg. 48583 (August 14, 2012), Docket No. USTR-2011-0011, September 14, 2012, at [http://www.iipa.com/pdf/2012\\_Sep14\\_Notorious\\_Markets.pdf](http://www.iipa.com/pdf/2012_Sep14_Notorious_Markets.pdf).

<sup>10</sup>See United States Trade Representative, *Out-of-Cycle Review of Notorious Markets*, December 13, 2012, at <http://www.ustr.gov/sites/default/files/121312%20Notorious%20Markets%20List.pdf>.

<sup>11</sup>International Telecommunications Union, *Mobile-Cellular Telephone Subscriptions Per 100 Inhabitants*, accessed January 24, 2013, at <http://www.itu.int/ITU-D/ict/statistics/>.

<sup>12</sup>The music industry group PARI reports that while the legitimate online market is growing in the Philippines, overall, the market is still contracting. Whereas in 2005, the market was sized at well more than 1.3 billion Pesos, with most of that revenue deriving from physical sales, in 2011, the market did not even reach 800 million Pesos, notwithstanding that the digital/online market now makes up more than 25% of the total market, and this year several legitimate online services opened, including Mymusicstore.com.ph, opm2go.com, and iTunes Philippines.

<sup>13</sup>The 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.

**Piratical imports:** There remain some reports from OMB that pirated optical discs are being smuggled from China through airports and seaports into the Philippines. The Bureau of Customs (BOC) under Commissioner Rufino Biazon is trying its best to monitor shipments containing pirated optical media. The Bureau is coordinating with the OMB regularly to control smuggling of the pirated goods into the country.

**Karaoke Music Licensing Issue:** Karaoke is popular in the Philippines, and various machine brands are sold in Raon, Quiapo with accompanying DVDs 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. Additional problems include the emergence of flash disks, memory cards, and hard drives. 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 right holder.<sup>14</sup> Under-declaration by legitimate providers also continues to cause losses to content owners, as does individual illegal connections to pay-TV signals. To deal especially with the latter problem, IIPA is very pleased that House Bill No. 709, "The Anti-Cable Television and Cable Internet Pilferage Act of 2012," passed third reading on March 5, 2012, and that Senate Bill No. 3345 by the same name passed on January 28, 2013.<sup>15</sup> The House adopted the counterpart Senate Bill with amendment on January 30, 2013, and the law now reportedly awaits signature. The Bills would make it illegal and subject to criminal penalties in the Philippines to engage in illegal tapping of any signal offered over cable television (CATV) or "cable Internet system" or the malicious destruction or removal of authorized CATV or cable Internet facilities. The bill also prohibits recording, reproducing, distributing, importing or selling of any intercepted or received CATV system/network signals for commercial purposes without the authority of the concerned CATV or cable Internet service provider. In 2006, IPO and the National Telecommunications Commission forged a Memorandum of Agreement to resolve disputes involving illegal pay-TV services and connections.<sup>16</sup> This MOA has led to one administrative case against a cable company, but resulted in an out-of-court settlement, and in the end, the costs of bringing the action far exceeded the settlement amount.

## **ENFORCEMENT UPDATE IN THE PHILIPPINES**

**Enterprise End-User Software Piracy Enforcement Ceases, and Solution to the Search Warrant Quashal Problem Is Needed:** BSA remains dissatisfied overall with the handling of its enterprise end-user piracy problem, and the results are indicative as the software piracy rate actually went up to 70% in 2011. In 2012, there were no end-user raids brought by BSA, a testament to the lack of confidence in the legal and judicial system arising from bitter experiences in 2010 and 2011.<sup>17</sup> BSA-initiated raids suffer from delays in getting authorities (both NBI and PNP) to grant written authority for their officers to act in a timely manner, even after preliminary investigations were

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<sup>14</sup>Specifically, the NTC has been known to renew licenses of companies engaged in signal theft. In 2011, IIPA understands that NTC began contacting cable companies when content providers issued cease-and-desist letters to cable operators transmitting unauthorized channel streams. This is a useful step and should lead to revocations of licenses in order to be truly effective.

<sup>15</sup>Senate of the Philippines, *Senate Passes Bill Prohibiting and Penalizing Cable Television and Internet Tappers*, January 28, 2013, at [http://senate.gov.ph/press\\_release/2013/0128\\_prib3.asp](http://senate.gov.ph/press_release/2013/0128_prib3.asp).

<sup>16</sup>Bernie Cahiles-Magkilat, *IPO, NTC Ink Agreement on Resolution of Broadcast Cases*, mb.com.ph, June 17, 2006, at <http://www.mb.com.ph/node/79641>.

<sup>17</sup>While the OMB conducted *ex officio* corporate inspection visits on more than 200 establishments in 2009 unfortunately, in several cases, criminal search warrants were quashed, so the number of raids against end-user piracy targets went down precipitously, to eight raids in 2010, and only two raids in 2011. Historically in the Philippines, all cases have required settlement based on evidence obtained in a raid on the target. This is so because taking a case through the court system to judgment in the Philippines would not only take years, but the expectation is that the judgment would be appealed for years, resulting in BSA incurring enforcement costs that would far exceed the likely amount of damages awarded against the target. There has also been a steady increase in arguably frivolous claims filed against BSA after raid action has been taken against targets (and then, in several cases, after a warrant was quashed, the right holders were left defending a lawsuit when they should have easily prevailed in open-and-shut piracy cases).

conducted through private sector assistance. Inquest procedures with DOJ prosecutors remain difficult, with burdensome requirements to file charges in court. The high standard of “personal knowledge” for issuance of a search warrant remains a huge challenge for investigators and law enforcement authorities investigating end-user piracy cases.

**Dealing With Book Piracy Requires Government Will:** To address the significant book piracy issues, the Department of Education and, in particular the Commission on Higher Education, should take a more active role in developing the adoption of appropriate use and copyright policies among universities, encouraging the use of legitimate or original reading materials at colleges and universities, and ensuring that institutions of higher learning adopt and implement such policies. There have been earlier efforts to adopt appropriate use guidelines but these were entirely voluntary, with no monitoring or reporting requirements associated with the implementation of such policies. Thus, to date, there has not been broad adoption of appropriate use policies to ensure that students are not engaging in infringing behavior, and that on-campus vendors (such as copy shops) are not providing unauthorized copy- or print-on-demand services. 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 *Multilinks/Marquez* case<sup>18</sup> remains pending, now some seven 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. Even in the case of successful raids, pirates generally resume operations after posting bail as the delays remain endemic in the system.

**Addressing Internet and Mobile Device Piracy Before They Cause Significant Damage:** IIPA urges the Philippine government to get ahead of the problem of Internet piracy before it spirals out of control. IIPA recommends empowering the NTC to work closely with the IPO Philippines to act aggressively against Internet piracy and to deal with mobile device piracy, and enhance anti-piracy enforcement work carried out by OMB by including mobile device piracy within its purview. Recent meetings between industry and the IPO together with ISPs, the NTC, and NBI indicated some helpful willingness on the part of ISPs to address online piracy if they have a legal basis. Both the new Copyright Law, which contains principles of secondary liability, as well the E-Commerce Law, together should provide a preliminary basis to take action such as disabling access to infringing materials online. In the meantime, right holders have had to resort to self-help and voluntary cooperation among services and ISPs. In one example, involving *Soundcloud.com*, the music industry group PARI reports very good success in taking down sound recordings illegally uploaded by users.

**Remedy Enforcement Bottlenecks Within DOJ:** IIPA has long reported bottlenecks in the preparing of criminal cases through the DOJ prosecutors. IIPA now understands DOJ has farmed out the filing of IP cases to city prosecutors' offices. DOJ will accept the filing of “high profile” IP cases on a case-by-case basis. Whether the farming out of the filing of IP cases will be beneficial remains to be seen. In a related development, the DOJ “IP Manual for Prosecutors and Law Enforcement Agents” was, according to IPO, ready in October 2012, and should be issued and distributed as soon as possible.

**Getting to the Source – Customs “Choke Points” and Optical Media “Burning”:** The IPO Philippines has indicated a new approach to hard goods piracy 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.<sup>19</sup> We also recommend that OMB be given purview over seizing “burned” discs and “burning” machinery detected during raid actions, as well as added authority to take action against mobile device piracy and “media box” piracy. This added authority of the OMB to take action

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<sup>18</sup>The *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 been plagued by delays.

<sup>19</sup>In 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.

against mobile device piracy would be very strategic since these cell phone stalls/kiosks are usually in areas with reported hard goods piracy problems.

**Further Addressing Camcording Piracy:** One of the great success stories in recent years in the Philippines as well as throughout Asia has been the passage and implementation of the anti-camcording law (Philippines Republic Act No. 100,088) in 2010, which saw an impressive reduction in forensic matches back to the Philippines of illegal camcords of major motion pictures. Before the Philippine anti-camcording law was passed in 2010, there were 86 cases between 2008 and 2011. Since the start of 2012, there have been just four. 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 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, 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 Act. It is critical that the government hone in on the problem of illegal camcording, since camcording is particularly damaging in the Philippines, fueling rampant online piracy, negatively impacting worldwide distribution, and preventing 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.

**Enforcement Against Street and Retail Piracy:** The overwhelming success story in the Philippines remains the response to hard goods piracy in Metro Manila, which has been driven underground. This is due in part to unprecedented enforcement actions. For example, IPO Philippines noted in a December 2012 letter the seizure of P5 billion Pesos worth of pirated/counterfeit materials between January and November 2012, although even this is dwarfed by reported seizures in 2011 of nearly P8.4 billion worth of counterfeit and pirated goods. OMB reports over 2,600 administrative complaints in 2012, resulting in 16 court cases and 45 active prosecutions. The MOU between OMB and PNP has resulted in PNP officers becoming more attentive to the problem of open physical street and mall piracy and resulted in seized pirated optical media increasing dramatically during the peak of the implementation period. The pilot implementation period of the MOU produced some issues of communication to all police precincts and transportation of the seized items back to Manila, but the revised MOU will deal with these issues.

**Transformation From Piracy to Legitimacy:** One of the most remarkable aspects of the fight against once-rampant hard goods piracy is the way IPO DG Blancaflor has worked together with other agencies to seek a total transformation of the pirated DVD/CD vendors into legitimate business owners. IPO, OMB, Department of Trade and Industry (DTI), Department of Tourism (DOT), National Commission on Muslim Filipinos (NCMF), Department of Social Welfare and Development (DSWD), and private groups, are working to turn the pirate vendors to legitimate businesses, with government mainly waiting for funding, but private groups already participating to be part of the transformation. Looking at Quiapo today, legitimate stores like restaurants, textile shops, and clothing shops line the area. The same transformation can be seen in other previous piracy hotspots like Harrison Plaza, Makati Cinema Square, and St. Francis Square. IIPA commends the government and private sector for working toward a holistic resolution of the piracy problem in the Philippines, which can have other beneficial societal effects.

**Issuance of New Supreme Court Rules of Procedure for Intellectual Property Cases Gives Hope for Greater Deterrence in Future 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. The Rules also bring with them the designation of 65 regional trial courts (22 in the National Capital Region and 43 in other regions) to improve adjudication of IPR cases. The Rules bring about a number of critical improvements, namely, they impose time limits that 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.<sup>20</sup> 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,<sup>21</sup> and it is hoped the Rules as implemented will result in a more effective judicial remedy.

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 2012 for copyright piracy. The largest criminal fine ever imposed in the Philippines for copyright piracy was a modest P200,000 (approximately US\$4,300 at the time), 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). IIPA has documented the many problems in the criminal trial process in previous submissions. It is hoped the new Rules will help resolve these longstanding deficiencies in the judicial system. In the meantime, 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.

## **COPYRIGHT LAW AND RELATED ISSUES**

**New Copyright Law Through Bicameral Conference:** Copyright protection is governed under Republic Act 8293, the Intellectual Property Code of the Philippines (in force January 1, 1998). The Philippines acceded to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) in 2002. The Philippine government has been considering IP Code amendments for over a decade; IIPA has weighed in on many occasions on various versions of the draft amendments. We understand as of late January 2013 that the Bills have passed both the House and Senate and have gone through bicameral conference, meaning the amendments are likely to enter into force in 2013.

The Bills contain many elements needed to establish a fully modern copyright system, but do not contain all of the strong elements contained in previous bills. We support: i) granting the IP Office of the Philippines greater enforcement functions, ii) the broad definition of the “communication to the public” critical for protection of copyright in

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<sup>20</sup>One 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.” This line of cases and more recent cases calls into question whether a search warrant is “available” as required under the TRIPS Agreement, and has been discussed in greater detail in previous IIPA Special 301 reports on the Philippines.

<sup>21</sup>The 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:

- 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.

the online (and mobile) environment, iii) the express “making available” right for related (but this should be expanded as the general rule to all communications to the public), 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, vi) the provision of “double” damages and mandatory maximum sentences for unlawful “circumvention,” and vii) the helpful enforcement disclosure requirements. There remain some aspects of the Bills 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 or even in explanatory memoranda. Among IIPA’s chief concerns are:

- **Technological Protection Measures (TPMs):**

- The Bills lack explicit coverage of access control TPMs. Previous bills were superior in that they defined TPMs to include both measures used to restrict unauthorized access as well as the exercise of exclusive rights. By contrast, the current Bills may need some further interpretation, possibly through implementing regulations, to confirm coverage of “access control” TPMs. It may be that the drafters intend the phrase “restrict acts ... which are not authorized ... or permitted by law” to include access controls, but alternative wording, “any technology, device or component that, in the normal course of its operation, controls access to a protected work,” which was in previous drafts was clearer and preferable. We suggest that the term be clarified in implementing regulations to provide the latter quoted explanation.
- The Bills contain no prohibition on trafficking in or providing services related to circumvention devices, technologies, or tools, prohibiting only the act of circumvention expressly.<sup>22</sup>
- The Bills deem the circumvention of TPMs merely as an aggravating circumstance.

- **Civil Damages/Statutory Damages:** The Bills retain statutory damages, and provide 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”). While the minimums set are low at US\$1,140, it should be confirmed in explanatory notes or implementing regulations that the recovery amount is “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. Ultimately, the proof will come in whether civil cases result in damages “adequate to compensate for the injury the right holder has suffered” as required by TRIPS Article 45.

- **Duty to Account:** The House Bill introduces a new 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 be the intention of the drafters, but in this case, IIPA is concerned that the insertion of a duty to account to all licenses or assignments may unduly interfere with the exercise of exclusive rights by right holders and impinge on their freely negotiated licenses and assignments. The Senate Bill appears less harmful and restrictive as it simply indicates, “The copyright owner has the right of regular statements of accounts.” In the Bicameral Conference, the Senate version should be adopted.

- **Exceptions:** Several exceptions in the Bills must be examined and altered to ensure they meet the Berne Convention three-step test.

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<sup>22</sup>A previous Senate bill 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.

- **Exception for the visually impaired:** The House Bill 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.” 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 2<sup>nd</sup> and 3<sup>rd</sup> 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 should be confirmed 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 (for example, it is not expressly subject to the three-step test), but at least it does not expressly permit copies made abroad to be distributed; in the Bicameral Conference, that part of the Senate Bill should be adopted.
- **Library Exception Broadened:** The House Bill broadens 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 purposes and for preservation of the work.
- **Decompilation Exception:** The House Bill includes a “decompilation” exception for software. The current version no longer contains 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.” In the House Bill this reads “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 included in explanatory memoranda or implementing regulations.
- **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 Secondary Liability:** The House Bill 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.” 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 phrase “given notice” should, in the explanatory memorandum, be understood 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).
- **Importation Right:** The House Bill 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 is to provide the author with the ability to authorize imports and prevent unauthorized imports.
- **Designation of Agent to Enforce Rights:** The House Bill is not entirely clear in defining who may enforce rights on behalf of copyright owners, 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 the Bills removed this important and positive change.

**Service Provider Issues:** While the new IP Code, when enacted, will spell out with specificity some important criteria for secondary copyright liability, 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).<sup>23</sup> 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 mostly 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**

**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 high 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. These oppressive tax burdens detrimentally impact the development of a legitimate audiovisual business.

**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.

**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-

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<sup>23</sup>Section 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.”

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 and limit the ability of motion picture companies to distribute content in the Philippines. They should be discarded.

**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 value assessment that included royalties generated from the exhibition of the film. Such a duty assessment would have been 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 moved away from royalty assessments, but it remains unclear what method of valuation is now being utilized, or whether such method is being applied uniformly across the board. This issue requires continued monitoring.

**Potential Introduction of Restrictions on Advertising:** Over the years, a number of bills have attempted to limit advertising on pay-TV. Restricting advertisement placement should be avoided, as it 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.

## **GENERALIZED SYSTEM OF PREFERENCES**

The Philippines enjoys preferential trade benefits under the Generalized System of Preferences trade program. Among the criteria the President must take into account in determining whether a country should continue to be designated as a GSP beneficiary country are "the extent to which such country is providing adequate and effective protection of intellectual property rights," and "the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets ... of such country." 19 USC 2462(c)(4) and (5). During the first eleven months of 2012, almost US\$1.15 billion in imports to the U.S. from the Philippines enjoyed duty-free treatment under the GSP Program, or more than 12.9% of the Philippines' entire imports into the U.S.<sup>24</sup> The Philippine government needs to continue to endeavor to meet the adequate and effective test under the statute to remain eligible to receive favorable treatment under the GSP program.

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<sup>24</sup>During 2011, more than US\$1.13 billion in imports to the U.S. from the Philippines enjoyed duty-free treatment under the GSP Program, or more than 12.4% of the Philippines' entire imports into the U.S.

# TAIWAN

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA files this Special Mention report on Taiwan 1) to raise significant concerns over growing Internet piracy in the market and the failure of the Taiwanese government to implement measures in place which could help combat this problem and foster greater cooperation among ISPs, and 2) to raise other significant copyright piracy and enforcement concerns which, if not addressed, should lead to re-listing Taiwan on the Special 301 Watch List.<sup>1</sup>

**Executive Summary:** Internet piracy remains the most urgent problem in Taiwan, and the emergence of “media box” piracy, consisting of set-top boxes by which Taiwanese are infringing copyright, and the position taken by the Taiwanese government that the “media box” is legal (notwithstanding that its manufacturers in China do so knowing the device is predominantly used to infringe), has raised a significant new concern. Commercial photocopying of textbooks on or around university campuses remains rampant. The Taiwanese government, which once took a serious attitude toward copyright piracy, has allowed the problem, particularly in the online environment, to once again spiral out of control. We remain deeply concerned that ISPs and couriers (shipping the “media boxes” or hard discs with infringing content) do not take any responsibility or cooperate with right holders trying to protect their rights on the Internet or at the borders. This attitude seems to reflect that of the government. Meanwhile, police and prosecutorial turnover means new officers have little awareness of copyright infringement cases or investigative techniques and needs, although we note positively the establishment of the Taiwan High Prosecutors’ Office, Intellectual Property Branch, deployed with 15 prosecutors as the counterpart of the Intellectual Property Court. Judges generally view copyright piracy as a minor offense, so most criminal cases recently have resulted in suspended sentences or “suspended indictments.” There were great hopes after passage of the ISP liability law in April 2009 and Taiwan Intellectual Property Office (TIPO) regulations adopted in November 2009 that the government would begin addressing P2P and other online infringements in a more serious way, but the law remains dead letter, thereby stifling right holders’ abilities to leverage much-needed cooperation from ISPs in combating online infringements.

### PRIORITY ACTIONS REQUESTED IN 2013

#### **Enforcement Issues**

- Fully implement the ISP liability law to provide an effective remedy against Internet infringements, including holding ISPs responsible if they do not have and implement a termination policy for repeat infringers. Consider new measures to deal with foreign websites infringing copyright in Taiwan.
- Improve enforcement against illegal photocopying on and near university campuses, especially during peak academic periods when unauthorized copyright is rife.
- Ensure IP courts hear first instance infringement cases for most types of copyright infringement cases, and introduce compulsory Internet, software, and other copyright infringement investigation trainings for judges and prosecutors.
- Streamline the enforcement processes among Taiwan Customs, and reduce bureaucracy and red tape so as to speed up copyright infringement prosecutions initiated by them.
- Ease process of obtaining search warrants by relaxing evidence collection and burden of proof hurdles.
- Confirm that Intellectual Property Rights Police (IPRP) merger into criminal force will not dilute its IPR enforcement efforts.

<sup>1</sup>For more details on Taiwan’s Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2013SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years’ reports at <http://www.iipa.com/countryreports.html>.



- Ensure IPRP and Joint Internet Infringement Inspection Special Taskforce (JIST) have adequate manpower, equipment, and training.
- Increase the award budget for IPR cases, and ensure that awards are available for Internet-based infringement cases.
- Encourage legalization of pay-TV market.
- Reinvalidate Customs' response times to deal with infringing materials at borders; swiftly forward such cases to prosecutors.

### 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. In addition, pass amendment to provide a more effective remedy against websites fostering massive infringements of copyright; remedy should ensure a fair and effective mechanism to disable such activities.
- Outlaw "media box" piracy.
- Amend the Copyright Collective Management Organization Act to remove unacceptable provisions denying use of agents, empowering TIPO to set a "joint royalty rate," and appointing 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.
- Pass copyright term extension.

### Market Access Issue

- Cease setting price ceiling on pay-TV subscriptions.

## PIRACY UPDATES IN TAIWAN

**Internet Piracy Worsens in Taiwan:** Over the past several years, industry has noted an increase in the severity of Internet piracy with increased Internet and broadband penetration,<sup>2</sup> particularly in the use of deeplinking, P2P,<sup>3</sup> BitTorrent, blogs, and "one-click hosting," to infringe copyright in movies, music, software, games, and books and journals.<sup>4</sup> People in Taiwan often obtain unauthorized content from websites located overseas, particularly websites located in mainland China (due generally to their preference for Chinese language interfaces), such as *youtmaker.com*, *verycd.com*, Xunlei's Thunder (*xunlei.799.com.tw*), *streamdrag.com*, *1ting.com* and *1g1g.com*. The music industry roughly estimates Internet piracy in 2012 at 85% (only slightly down from 88% in 2011) with US\$130 million in estimated losses due to online piracy.<sup>5</sup>

**"Media Box" Piracy – A Rapidly Emerging Threat Requiring an Equally Rapid Response:** A newly emerging problem throughout Asia is "media box" (set-top device) piracy, in which a user connects illegal sites to stream or download illegal content through the box. This phenomenon is the fastest growth Internet-based piracy in

<sup>2</sup>Mag Chang, *Internet Use Hits All-Time High in Taiwan*, Taiwan Today, July 10, 2012, at <http://taiwantoday.tw/ct.asp?xItem=193241&ctNode=413>. The article reports that the number of Taiwanese Internet users over the age of 12 reached an all-time high of 15.94 million in May 2012, accounting for more than 77% penetration, according to the Taiwan Network Information Center. More than 12 million of those, or 74.18%, use broadband and 80% of all households have broadband. More than 47% of users are engaged in online gaming.

<sup>3</sup>For example, IIPA cited *Xunlei*, a Chinese site, in its 2012 Notorious Markets recommendations, as did an IIPA member. See International Intellectual Property Alliance (IIPA), *Submission Re: IIPA Written Submission Re: 2012 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 77 Fed. Reg. 48583 (August 14, 2012), Docket No. USTR-2011-0011, September 14, 2012, at [http://www.iipa.com/pdf/2012\\_Sep14\\_Notorious\\_Markets.pdf](http://www.iipa.com/pdf/2012_Sep14_Notorious_Markets.pdf).

<sup>4</sup>Over 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>.

<sup>5</sup>The physical piracy rate for sound recordings in 2012 was an estimated 11% with US\$7 million in estimated losses. These numbers are accompanied by an uptick in the digital music market of 35% year-on-year through the first half of 2012 and 21% decrease in physical music market (the latter being due to economic recession). Digital sales now make up 23% of the market in Taiwan, up from 17% in 2011. Physical pirate OD products in Taiwan are distributed mainly through home delivery (pirate product catalogues are either dispatched to consumers' doorsteps or available on the Internet).

Taiwan (and is a noted phenomenon throughout Asia). The boxes originate in China, and various kinds of boxes are available all throughout Taiwan, including at so-called “3D” shops that sell computers, software, and peripherals. There are generally understood to be three different types of device: 1) a device that can directly connect to foreign sites (again, these sites are virtually all located in China); 2) a device with a hard disc to store downloaded contents; and 3) a device with an SD card which helps novices connect with the foreign site. Virtually all the foreign websites to deal with these boxes are operated in China, so there is no language barrier for local Taiwanese users.

**Book Piracy Continues Causing Harm to U.S. Publishers:** Illegal photocopying of books and journals on or near university campuses causes great harm to the U.S. publishing industry. Publishers find numerous instances of unauthorized photocopying by campus photocopy centers and the majority of students using illegally photocopied texts in the classroom. Unauthorized photocopying (particularly of higher education and English language textbooks (ELT)) remains the most damaging problem for U.S. and Taiwanese publishers. There have been instances where the photocopy shop delivers cases of illegal copied textbooks to the campus mail room, and being unable to locate the intended recipients, the mail room actually delivered the pirated copies to the publishers (apparently relying on the publisher logos on the covers). Online piracy, particularly of textbooks and password-protected material, is on the rise in Taiwan, being made available mainly from servers/sites in China.

**Software Piracy Remains Below Average, But Still Harms Right Holders:** Software piracy, including the unlicensed use of software by enterprises, continues to cause losses to the software industry, notwithstanding that the rate of piracy has steadily dropped over the years. Currently, the piracy rate sits just below the world average at 37%, with a commercial value of unlicensed software in Taiwan of US\$293 million (an increase from prior years as the overall size of the software market continues to grow).<sup>6</sup>

**Signal Theft:** Taiwan remains a territory replete with piracy of pay-TV content. As of September 2011, there were a recorded 5.09 million cable TV subscribers (a penetration rate of 63%) in Taiwan, but Nielsen and other reputable third parties consistently record far higher numbers of people who watch pay-TV at home, possibly as many as 95%, according to the industry group Cable and Satellite Broadcasters Association of Asia (CASBAA). This is likely due to a combination of piracy by individuals or buildings (combined with Taiwan government inaction) and under-declaration by local, independent cable operators. In either case, content owners do not end up receiving fair compensation for the number of consumers actually viewing their programs in Taiwan.

## **ENFORCEMENT UPDATES IN TAIWAN**

Despite a couple of continued bright spots<sup>7</sup> or areas of continued cooperation,<sup>8</sup> the enforcement situation in Taiwan has deteriorated in the past several years to the point that, without some signs of positive change, IIPA members will consider recommending that Taiwan once again be placed back on the Special 301 Watch List.<sup>9</sup>

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<sup>6</sup>BSA | The Software Alliance's 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Taiwan was 37%, representing a commercial value of unlicensed software of US\$293 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA's 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

<sup>7</sup>For example, due to continued cooperation with law enforcement authorities, hard goods piracy is rarely seen on the streets in Taiwan. As another bright spot, we understand that recently, the Investigation Bureau of Ministry of Justice (MJIB) has appeared more proactive on dealing with copyright infringement, showing an interest in copyright infringement cases (as opposed to only high profile/high value cases such as those involving organized crime or drugs). MJIB representatives participated, along with the local motion picture anti-piracy group, Taiwan Federation Against Copyright Theft staff, in a forum on cross-straits copyright infringement organized by TIPO and the Chinese Plate Right (Copyright) Association and coordinated with TFACT representatives thereafter, resulting in an MJIB investigation and raid in November 2012 against a “media box” manufacturer, Chuan Xi Fu. In January 2013, MJIB again coordinated with TFACT and undertook enforcement against an Internet forum site distributing unauthorized content.

<sup>8</sup>BSA continues to report good working relationships with the IPR police. BSA Taiwan filed five criminal complaints against corporate end-user targets in 2012. In addition, there were many raids initiated by enforcement authorities against targets for selling software over the Internet, and BSA was requested by the enforcement authorities to assist in inspecting illegal CD-Rs or CD-ROMs for eight such Internet piracy cases. Microsoft reports also receiving calls from Customs to inspect suspicious Xbox game titles.

**Internet Piracy Not A Public Crime, Thus Results Are Non-Deterrent:** Despite some signs of progress in dealing with Internet piracy, including the *EZPeer* conviction in early 2011, by 2012, enforcement against Internet-based piracy activities had become an afterthought on the part of the Taiwanese government. The recording industry reports that 68 Internet-piracy criminal cases were filed between January and November 2012, and 20 (including 10 juvenile) out of 68 cases resulted in judgments. Only three convictions resulted in a prison sentence served (the remainder of those resulting in prison sentence being suspended). Forty-eight cases remain pending. In addition, in digital piracy cases, the ratio of suspension of indictments is high, at 80% (12 of 15) in 2011 and 70% (7 of 10) from January to November 2012.

To address the growing problem of Internet piracy, the Copyright Act should be reformed so that Internet-based piracy is deemed a public crime. Through this change the Taiwanese government can be made to take the serious steps needed to address online infringements in the market, including through *ex officio* enforcement actions. In the absence of this change, police officers, prosecutors and judges have been reluctant to take on the issue of Internet piracy in Taiwan. The numbers of Internet piracy cases are few and dependent on right holder complaints. Of course, from the start, right holders have no right to access to the identification/information of the infringers. Such information can be obtained by police officers, but right holders may only get such information after they have filed a criminal complaint, thus, a Catch-22 situation ensues. Even when right holders have submitted sufficient materials, due to lack of knowledge of Internet technologies, prosecutors and judges have at times not been able to understand the Internet piracy claim. In other cases, prosecutors cannot get approval from the judge for a search warrant due to the judge's insufficient knowledge of Internet-based infringements. Few prosecutors understand the seriousness of Internet piracy, and right holders report that after the recent reshuffle within the prosecutor's office, newcomers to the office have shown even less interest in copyright issues. Right holders are also being pressed by prosecutors and judges to settle such cases.

No steps have been taken by the Taiwanese government to take the necessary steps to achieve full implementation of the ISP liability law. That law held out hope that the Taiwanese government would provide an effective remedy against Internet infringements, including holding ISPs responsible if they do not have and implement a termination policy for repeat infringers. In addition, we urge the Taiwanese government to consider new measures to deal with foreign websites infringing copyright inside Taiwan. In the absence of this legal framework, right holders have had little choice but to attempt takedowns of hosted infringements through cease and desist letters. In this, the industries have been successful in the hosted environment. For example, the recording industry reports over 13,365 C&D letters in 2011 and 12,386 up to November 2012, with a takedown rate against unauthorized music on a hosted website at over 90%. The motion picture industry reports similar success with a 75% takedown rate for major U.S. motion pictures, and relatively fast takedowns.

The situation is bleak, however, when dealing with non-hosted infringements. It is here that the vacuum in leadership in TIPO is most strongly felt, since the legislative framework was supposed to foster ISP cooperation, yet, ISPs are extremely reluctant to cooperate in dealing with non-hosted infringements. In June 2012, after more than a couple years' urging, TIPO finally initiated a meeting between right holders and major ISPs to discuss the long-absent "code of conduct" for ISPs to implement the provisions of the ISP liability law, and to deal with right holder notices of non-hosted infringement and report such to the alleged infringers. Only one ISP, HiNet (the ISP division of Chunghua Telecom), agreed to receive notices, and then only proposed five notices per month. The Taiwanese government must address this problem swiftly and encourage all players to deal more effectively with the growing Internet piracy dilemma in Taiwan. Otherwise, the problem will grow out of control, harming right holders and creating a more significant trade irritant with the United States. We note that TIPO has essentially dropped the ball since passage of the ISP liability legislation. As control of ISPs falls within the jurisdiction of the National Communication Commission (NCC) should now get involved by ensuring full implementation of the ISP liability legislation. Right holders would welcome a meeting immediately with NCC, ISPs, and TIPO to forge a meaningful path forward.

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<sup>9</sup> Even though physical piracy is not the problem it once was, it is somewhat telling that even enforcement against physical facilities is way down. According to the local recording industry's records, there were 22 physical piracy cases in 2011, but only 8 physical piracy actions through November 2012. In each year, there was only one successful raid against a piracy burning lab, according to the industry.

**Enforcement Against Book Piracy Ineffective, Needs New Approach and Recognition of Seriousness of the Problem:** Over the years, IIPA has urged the Taiwanese government to implement effective approaches to legalization of the use of published materials, particularly on or around university campuses. Just as we have urged, the Taiwanese government has remained steadfastly reluctant in its approach to dealing with universities, perhaps fearing the political backlash associated with enforcing copyright and imposing the costs for legitimate books on students. In 2012, the situation did not improve, and requires a new approach. The Taiwan Border Protection Agency conducts copy shop raids twice per year with little result, but this has apparently led the Ministry of Education (MOE) and the Ministry of Justice to conclude that such piracy is not a major concern. MOE is not taking any other effective steps to combat piracy on university campuses and blocks third-parties from investigating piracy on campus. 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.

**IP Courts Should Hear First Instance Criminal Copyright Cases, Expand Influence, Expand Trainings of Judges and Prosecutors on Internet Copyright Issues:** The specialized IP Courts in Taiwan, which began hearing cases at the appellate level in criminal cases for both copyright and trademark infringement in July 2008, have handed down some important decisions in the past, but are in need of some reworking. Most right holders believe that the courts should also have jurisdiction for first instance criminal copyright cases, but some believe that the IP Court judges require further training, as they generally view copyright infringements as petty offenses. In the meantime, judicial enforcement of copyright in the regular courts has also not been satisfactory, as judges either suspend indictments or try to convince victims to settle. Second, these lower court judges also traditionally treat copyright infringement as a minor crime, and have rarely delivered deterrent sentences. Third, the IP Courts and Prosecutors’ offices should be better funded. Fourth, learning seminars should be launched for specialized IP judges and prosecutors on various forms of piracy, with a focus on Internet piracy, enterprise end-user software piracy, and book piracy, and forensic and investigative techniques and issues related thereto.

**Ease Process of Obtaining Search Warrants by Relaxing Evidence Collection and Burden of Proof Hurdles:** Certain industries continue reporting difficulties in obtaining criminal search warrants due to burdens imposed upon right holders by courts regarding evidence collection and onerous burdens of proof.<sup>10</sup> TRIPS requires a presumption of ownership of the copyright matter if the name of the right holder appears in the usual manner. The software industry reports that some courts find informant testimony insufficient proof, asking for additional evidence such as screen shots to prove the target is using illegal software. 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.

**Confirm that IPR Police (IPRP) Merger Into Criminal Force Will Not Dilute Its IPR Enforcement Efforts:** The IPRP Unit’s establishment was a contributing factor in Taiwan being removed from the Special 301 list several years ago. Right holders remain deeply concerned by reports that this Unit’s officers are being stripped of their motivation to engage in IPR enforcement. One indication of this is the planned merger of IPRP into the general criminal police. The IPRP is currently set under supervision of the Special Police Second Headquarters (SPSH) of

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<sup>10</sup>Search warrant are obtained based on the rules set forth in Sections 128 to 153 of Criminal Procedure Law. According to those Sections, a search warrant and seizure order may be granted upon the application of a copyright owner by the review and approval of a prosecutor and a judge. The search warrant and seizure order once granted shall be executed by a judge, a prosecutor, assistant prosecutor, or police officer.

the National Police Agency (NPA) within the Ministry of the Interior (MOI) deployed with 167 police officers. The SPSH, in order to raise the morale of IPRP officers and attract more outstanding officers to join IPRP, has proposed that IPRP's officers be characterized as criminal police. This characterization will make it easier for them to obtain future promotions. Both the IPRP and SPSH insist there will be no change in their duties as a result of this re-characterization. It is predicted the process will be completed in early 2013. IIPA remains concerned since apparently the Unit will now be responsible for other crimes, possibly including homicide. The Taiwanese government must ensure that copyright infringement cases retain the same priority and earn for the officer the same credit toward promotion as other criminal cases, so that IPRP officers who run anti-piracy actions will not feel at a disadvantage with regard to promotions and career advancement opportunities.

**Decreasing Budgets = Decreasing Impact for IPRP and Joint Internet Infringement Inspection Special Taskforce:** Along with the above impact of IPRP re-characterization is a troubling trend of de-emphasis on copyright enforcement. This is evidenced in 2012 by a decreasing number of overall raids.<sup>11</sup> The IPRP was authorized to have 220 officers available for enforcement duties, but presently only has 167 personnel; the additional 53 officers are urgently needed. In TIPO and the Ministry of Economic Affairs (MOEA) "Implementation Plan for Strengthening Internet Infringement Preventive Measures," the Joint Internet Infringement Inspection Special Taskforce (JIST) was given the exclusive responsibility for tackling Internet piracy, but its potential has never been realized. JIST was supposed to be comprised of selected personnel with expert knowledge in computers, IT, and technology from the IPRP, but JIST officers are mostly new college graduates who are working there as a substitute for military service. Thus, the Taskforce effectively serves as a training camp. In addition, due to the promotion and transference rules in police system, many good JIST hands have been transferred to other departments, with their successors mostly being inadequately trained. IIPA has called for this unit to be provided greater 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. Unfortunately, in 2012, JIST did not receive increased resources, and in fact, overall, IPRP's and TIPO's budgets were actually cut by 10%.

**Reduction in Award Budget, and No Awards for Internet Piracy Cases:** To add to the problems, IIPA understands that TIPO cut the anti-piracy monetary awards payable to IPRP to NT\$3.5 million (around US\$120,000) in 2012, compared to NT\$5 million (around US\$170,000) in 2011 and NT\$20 million (US\$680,000) several years ago. This has severely affected IPRP officers' morale and their willingness to combat copyright piracy. Further, given the serious damage being caused by Internet piracy in Taiwan, IIPA recommends once again that TIPO provide an award budget for Internet piracy cases. Unfortunately, in 2012, TIPO decided not to give any award with respect to Internet piracy cases which do 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 de-centralized to begin with and do not revolve around a single piece of equipment or device. Further, TIPO will not even grant awards for digital files (music, movies, software, etc.) stored in confiscated computers seized in Internet-based piracy enforcement actions.

**Encourage Legalization of Pay-TV Market:** The Taiwanese government should take steps well within their power to repress the phenomenon on pay-TV piracy, whether it results from individual piracy or commercial fraud. During late 2009, legislators sympathetic to our piracy concerns proposed legislation to make individual theft of cable service a criminal offense. This bill should be reintroduced and enacted. Second, the government should impose improvements in auditing and oversight so that copyright owners are paid based on proper declarations of numbers of subscriptions.

**Customs/Aviation Police Bureau/Prosecutor Must Work in Tandem Regarding Infringing Discs at Border:** In Taiwan, Customs is responsible for inspection of optical discs which are sent through it and contain infringing copyright works. After Customs confirms such discs contain infringing works, the case is transferred to the

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<sup>11</sup>According to IPRP's statistics, there were 2,243 cases (699 copyright cases and 1,544 trademark cases) in 2011; and 2,567 cases in 2012 (692 copyright cases and 1,875 trademark cases) in 2012.

Aviation Police Bureau for investigation and transferred to a prosecutor thereafter for criminal referral. Unfortunately, the system is not working as intended. Customs agents in Taiwan are public servants, with no judicial authority power to conduct seizure or search. Because of Customs' limited power, the APB and prosecutors' office are involved, but this has led to lukewarm involvement of Customs, leading to non-cooperation between Customs and APB, and lack of transferrals to Taiwan Prosecutors. In some cases, transferring a clear-cut case of infringement at the border has taken upwards of two years. In addition, the number of overall cases referred by Customs in the past year has reportedly decreased by more than half for one major software company. The TRIPS Agreement requires Taiwan to have a mechanism in place for applications to detain suspected pirated goods, and to provide generally for expeditious remedies

## **COPYRIGHT LAW AND RELATED ISSUES**

Copyright protection in Taiwan is governed by the Copyright Act, amended through 2010. The Act provides a sound legal framework, including important revisions confirming liability of those who encourage copyright through P2P and like services in 2007,<sup>12</sup> and ISP liability amendments in 2009 intended to deal with non-hosted infringements in the online environment. At the same time, some significant regulatory gaps remain, particularly with respect to implementing the ISP liability amendments imposing a duty on ISPs to have in place and implement a fair and effective repeat infringer policy. It is critical that TIPO urgently set to the task of issuing administrative guidelines for implementing the ISP liability provisions of the Copyright Act.<sup>13</sup> In February 2011, TIPO commenced a three-year process to amend the Copyright Act and reportedly plans release of a draft amendment before the end of 2013. From February 2011 to January 2013, TIPO held 26 internal meetings for discussing and proposing draft amendments. While no draft has been released for comment, from meeting minutes posted on TIPO's website, some concerning legislative developments seem to be emerging, including expanding the scope of "fair use" and adopting "neighboring rights" which would weaken copyright protection for sound recording copyright holders, among other changes.<sup>14</sup> IIPA urges the drafters to carefully weigh its multilateral commitments as well as the potentially harmful commercial effects any changes may have, particularly in this delicate moment in which Taiwan's system is being further refined to address severe and growing online infringements.

The Taiwanese government should also take up the following with priority in 2013.

**Amend the Criminal Code to Deem Piracy, Including Internet Piracy, a "Public Crime":** In 2003, Taiwan designated as "public crimes" all offenses related to optical disc (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, Taiwan's criminal provisions should now be further amended to include copyright piracy, especially

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<sup>12</sup>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.

<sup>13</sup>The local recording industry group, RIT, and HiNet, the largest ISP in Taiwan, have agreed on a six-month test period for HiNet to receive notices, and in part, based on the outcome of this test period, TIPO must issue guidelines for the implementation of ISP liability provisions.

<sup>14</sup>The following were 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; 2) a "right of re-communication to the public" would be introduced as to works but not sound recordings and performances; this right appears to be akin to a retransmission right over the Internet, and 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 act of renting, publicly displaying, or distributing a parallel import without consent of the right holder would be decriminalized; 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 also understands that the recently amended Patent Act now no longer includes a provision on "punitive" compensation, as the Taiwanese drafters have determined such compensation is inconsistent with the notion of civil compensation. In the copyright area, there are no "punitive" provisions, although Article 88 currently provides for "pre-established" damages of up to NT\$5 million if the infringement was "intentional and the matter serious." IIPA wants to ensure that this TRIPS-compatible provision will not be altered in future amendments.

Internet piracy, as a “public crime.” Both IIPA and local industry continue to urge TIPO to make Internet piracy a public crime so this issue can be effectively addressed.

**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 was to usher in a new era in addressing copyright protection on the Internet. The amendments set forth liability standards for ISPs, specifically clarifying that ISPs lose “safe harbors” 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 inducing people to infringe, etc.) would foster a new era of 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.

This issue was a subject of discussion at a June 2012 meeting between TIPO, TIPA, and certain ISPs but the discussion revolved mostly around a possible code of conduct for ISPs to implement the transfer of warning notices to P2P users. The outcome of that meeting has not led to satisfactory results, with only one right holder agreeing to a pilot notice period of six months with ISP HiNet, and then, for twenty notices per month. TIPO must urgently issue administrative guidelines for the implementation of the 2009 legislation, specifically with respect to ISPs implementation of their repeat infringer policies, to provide effective and fair mechanisms to address Internet infringement including in the non-hosted environment, providing greater certitude with respect to liability standards for ISPs, and fostering 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. IIPA also encourages NCC, which has purview over the ISPs and in many cases their parent telecommunications companies, to get involved in the discussion to forge a workable and effective path forward.

**Adopt New Approach to Websites Whose Business Models Are Based on Infringement:** The Taiwanese government, led by NCC, is currently in the process of drafting its Telecommunications Law. One proposal being considered is the ability to disable access to a website that engages in breaking the law. In May 2012, NCC proposed a draft amendment to Article 9 of the Telecommunication Act that if the content provided by a user of the telecommunication business violates the law, the telecommunication business may, as technologically feasible, either disable the user from using the network, remove the content, or take other appropriate measures according to a notice from the competent authority of the violation of law. NCC’s proposal did not apply to copyright infringement, and has been rejected by the Executive Yuan which requested a redraft which has not yet emerged. One possibility is that the redraft could cover copyright infringements, including those emanating from abroad. At this stage, after discussions between TIPO and NCC, NCC’s opinion is that the Copyright Act should govern such situations. The issue appears to be easier to address when concerning domestic Taiwan websites, but as noted throughout this report, many of the websites, including those servicing the so-called “media box” piracy are located overseas. An appropriate holistic approach to the problem of Internet piracy, including when the infringement is induced by a foreign website, is required to have a significant impact in Taiwan.

**Prohibit “Media Box” Piracy:** The Taiwanese government should clarify that “media boxes” comprised of hard drives containing infringing materials are subject to immediate seizure under the current Copyright Act. Boxes comprising of a hard disc filled with infringing content appear to raise a relatively easy case, since there would appear to be direct infringement occurring, possibly at the point of sale of the box (if not at the point of manufacture). For other categories of media box, we may need to look at the advertising of the boxes to determine if they are advertising a product to infringe copyright. We understand the devices often have to be modified at the point of sale or by the customer in order to enable them to infringe, but that the instructions for modification are provided by the

manufacturer through its website or through the point of sale. Such instructions or modification may be sufficient to show a violation, e.g., Article 87(7) of the Copyright Act. Article 87(7), para. 1 provides that a person is deemed to have unlawful intent when the “advertising or other active measures employed by the person instigates, solicits, incites, or persuades the public to use the computer program or other technology provided by that person for the purpose of infringing upon the economic rights of others.” To the extent the infringement occurs with the aid of the box, it may be argued these boxes constitute “materials and implements” the predominant use of which is to infringe copyright, and therefore they should be subject to immediate seizure upon evidence of infringement (again, likely at the point of sale). To date, the Taiwanese authorities have apparently considered such boxes to be similar in function to mini-computers and thus manufacturers and distributors are not considered to be violating the present Copyright Act as long as the device or its sellers do not encourage its use by consumers to obtain illegal content. Since the purchaser must make some small adjustments to connect to foreign websites, the manufacturers also take no responsibility for its illegal operation. We would urge the United States to engage with its Taiwanese government counterparts to enable effective action against this growing problem.

**Amend the Copyright Collective Management Organization Act to Remove Unacceptable Provisions (Denying Use of Agents, Empowering TIPO to Set a “Joint Royalty Rate” and Appointing a “Single Window” for Collection):** On January 12, 2010, the Legislative Yuan adopted amendments to the Copyright Collective Management Organization Act (CCMOA). The Act as amended unfortunately leaves in place overbroad authority in TIPO to fix royalty rates for both the broadcast and performance of music and sound recordings and allows for delays in fixing the rate, thus interfering with the ability of right holders to collect royalties. The Act establishes a four-month time limit on TIPO approval of these rates and requires TIPO to reconstitute a special rate setting committee to include right holders as well as users and experts. The Act should be modified to favor a freer market approach, allowing for the use by right holders of agents to collect royalties, allowing for fairer tariff rates, and doing away with the single licensing window.

First, the Act does not 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.

Second, most unfortunately, the tariff rates approved by TIPO are 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\$6.80). Similarly, the tariff rate for public performances on highway and tour buses was proposed at NT\$2,000 (US\$68) per bus per year, which TIPO cut to NT\$550 (around US\$18.50). The tariff rate for hotel rooms per year was proposed at NT\$240 (US\$8) but was set by TIPO at NT\$40 (US\$1.40). The tariff rate for shops and retail was proposed at NT\$2500 (US\$86) but was set by TIPO at NT\$1050 (around US\$36). The latter two result in losses of revenue to the music industry of nearly US\$1 million per year.

Third, the Act provides for a single society to collect royalties for right holders of different categories. Article 30 of the Act grants TIPO the authority to designate a “single licensing window” and set the joint royalty rate.

Experience has shown that licensing markets function effectively where rights holders remain free to find the most efficient way to administer their rights. Freeing the market from any restrictions means that competition between different players 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 Taiwanese government 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 Organization of Economic Co-operation and Development (OECD) 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.”

## **MARKET ACCESS ISSUES**

**Price Ceiling on Pay-TV Subscriptions:** To add injury to the ongoing harm of pay-TV theft in Taiwan, the Taiwanese government currently supports a price ceiling policy for pay-TV subscriptions which provides a disincentive for content providers to enter the market. While this situation should be changed with oncoming digitization (it should be easier for the government to support a “pay what you see” policy within a digitized environment), the Taiwanese government should ease any current price controls in this market.

## **TRAINING AND PUBLIC AWARENESS**

As has been the history, the Taiwanese government itself, and in conjunction with right holders, have held many training and public awareness sessions over the years. Some of the Taiwanese government activities relate to encouraging legal usage of copyright materials. In 2012, TIPO once again was helpful in campaigning to urge Taiwanese government agencies as well as government-funded educational institutions to obtain necessary licenses from right holders before using copyright materials. In addition, the MOEA, TIPO, the Judicial Yuan and the Ministry of Justice provided several training programs including the following:

- Training programs by “Judicial Personnel Study Institute of Judicial Yuan”:
  - March 1, 2012, April 5, 2012, June 1, 2012, July 23, 2012, August 17, 2012, October 8, 2012, and October 26, 2012 for 30 judges, judges’ assistants and clerks (each time) on topics such as “Practices of Perpetuation of Evidence and Provisional Remedies Proceedings of IPR Civil Cases.”
  - August 8-10, 2012 for “15 judges from IP Court and 30 judges from district courts and high courts who are in charge of IPR cases” on “Study and Analysis of the Latest Copyright Infringement Cases,” “Case Study of Reproduction and Adaptation of Works” and “Analysis of Criminal Liability for Copyright Infringement.”
- Training programs by “Judges and Prosecutors Training Institute of MOJ”
  - May 21-25, 2012 for “All new judges and prosecutors” on topics such as “Perspective of IPR Case Practices,” “Analysis of Internet Infringing Cases,” “Review of Criminal Policy for IPR,” “Investigation of IPR Cases,” “Perspectives of IPRP Operation,” “Study of Copyright Legal System,” “The Role Prosecutors Are Playing in IPR cases,” and “Cross-Relation Between IPR Laws and the Fair Trade Act.”
- Training programs by MOEA /TIPO
  - May 28-June 1, 2012 for “60 police officers from economic division of local police agencies island-wide and IPR police officers” on “Practices of Investigation Against Copyright Infringing Cases,” “Criminal Investigation Against Trademark Infringing Cases,” “Practices of Investigation Against Illegal Copies,” “Practice of Identifying Luxury Goods,” “Study on Trademark Infringement,” “Exploration of Cloud World,” “Practices of Investigation Against Audio-Visual Works,” and “Practices of Investigation Against Sound Recordings.”
  - June 4-8 2012 for “60 police officers from economic division of local police agencies island-wide and IPR police officers” on “Practices of Investigation Against Internet Infringement Cases,” “Practices of Investigation Against Game-Ware Infringement Cases,” “Judgment Criteria for Unauthorized Public Performance Via Karaoke Machine,” “Practices of Investigation Against Infringements by Small-Amount Auction, Blogs and Unauthorized Transmission,” “Practices of Investigation Against Pirate CD Plants, Pirate Product Catalogues Attached to Newspapers and Company Software Infringement,” “Practices of Customs Border Controls,” “Practices of Investigation Against Pirate Computer Software,” and “Practices of Investigations Against Karaoke Infringement.”

In addition, in 2012, industry was quite active in training in Taiwan. The software industry cooperated with TIPO, the Intellectual Property Rights Protection Taskforce, Taiwanese Customs, and the MOE to provide in total 13 seminars and trainings on software and IPR protection related issues, such as how to identify genuine software and how to manage IPR in universities. The attendees included around 460 school and university faculty, 260 police officers, and 300 other government officials (IT or procurement related). The motion picture industry also conducted trainings, including one for regular police on copyright knowledge, held on May 31, 2012 (40 police attended the session), two trainings for IPR Police on copyright issues held on October 16 and 18, 2012 (80 police attended the two sessions in total), five trainings for Customs Officials on detecting illegal DVDs held on June 5, 13, 20, 26, and August 31, 2012, (300 officials attended these programs in total), and two training programs for newly drafted JIST officers on March 29, 2012 and November 8, 2012 (20 draftees to the JIST force attended the programs). The local recording industry group, RIT, also conducted a training on copyright issues affecting the record industry for a group of 40 police officers on June 1, 2012. In addition, RIT participated in two copyright educational campaigns for 250 high school students on October 9, 2012 and 150 university students on December 5, 2012. Nevertheless, more training for judges and prosecutors on Internet, software, and other IPR related infringement investigations is needed.

# APPENDIX B: METHODOLOGY

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

### SOFTWARE

#### *Global Survey of Software Users*

A key component of the 2012 BSA Global Software Piracy Study (examining software piracy during 2011) is a global survey of software users, led by the highly regarded research firm Ipsos Public Affairs. The most recent survey was conducted among 14,700 business and consumer PC users, online or in-person, in 33 markets that make up a globally representative sample of geographies, levels of IT sophistication, and geographic and cultural diversity.

The survey is used, in part, to determine the "software load" for each country — that is, a picture of the number of software programs installed per PC, including commercial, open-source and mixed source programs. Respondents are asked how many software packages, and of what type, were installed on their PC in the previous year; what percentage were new or upgrades; whether they came with the computers or not; and whether they were installed on a new computer or one acquired prior to 2011.

In addition, the surveys are used to assess key social attitudes and behaviors related to intellectual property, software piracy, and other emerging technology issues. This insight provides fresh perspective each year on the dynamics underlying software piracy around the world.

Among the new improvements to the study is the development of a rotational strategy for the survey to enhance country coverage year upon year. Going forward, 11 countries will be surveyed annually, and 42 countries will be surveyed at least once every two to three years. The remainder will be surveyed on an ad hoc basis, generally one a year. As has been the case, the total survey population in any given year will account for approximately 90 percent of the PC software market.

#### *Calculating Software Piracy Rates*

Since 2003, BSA has worked with IDC, the leading provider of market statistics and forecasts to the IT industry, to determine software piracy rates and the commercial value of pirated software.

The basic method for coming up with the piracy rate and commercial value of unlicensed software in a country is as follows:

1. Determine how much PC software was deployed during the year.
2. Determine how much was paid for or otherwise legally acquired during the year.
3. Subtract one from the other to get the amount of unlicensed software. Once the amount of unlicensed software is known, the PC software piracy rate is computed as a percentage of total software installed.

$$\text{Unlicensed Software Units/Total Software Units Installed} = \text{Piracy Rate}$$

To calculate the total number of software units installed — the denominator — IDC determines how many computers there are in a country and how many of those received software during the year. IDC tracks this



information quarterly in 105 countries, either in products called "PC Trackers" or as part of custom assignments. The remaining few countries are researched annually for this study.

Once IDC has determined how many computers there are, and using the software load data collected in the survey, it can determine the total software units installed — licensed and unlicensed — in each country.

### **Number of PCs Getting Software x Installed Software Units per PC = Total Software Units Installed**

To estimate the software load in countries not surveyed, IDC uses a series of correlations between the known software loads from surveyed countries and their scores on an emerging market measure published by the International Telecommunications Union, called the ICT Development Index. These correlations are used to group the countries into cohorts, wherein the average software load of surveyed countries in each cohort is applied as the estimated software load for non-surveyed countries in that cohort. In 2011, IDC expanded the number of cohorts from four to six in order to provide more precision in applying surveyed values to similar countries.

To get the number of unlicensed software units —the numerator of the piracy equation — IDC must determine the value of the legally acquired software market. IDC routinely publishes software market data from about 80 countries and studies roughly 20 more on a custom basis. For the few remaining countries, IDC conducts annual research for the purposes of this study. This research provides the value of the legally acquired software market.

To convert the software market value to number of units, IDC computes an average price per software unit for all of the PC software in the country. This is done by developing a country specific matrix of software prices — such as retail, volume-license, OEM, free, and open-source — across a matrix of products, including security, office automation, operating systems, and more.

IDC's pricing information comes from its pricing trackers and from local analysts' research. The weightings — OEM versus retail, consumer versus business — are taken from IDC surveys. IDC multiplies the two matrices to get a final, blended average software unit price.

To arrive at the total number of legitimate software units, IDC applies this formula:

### **Software Market Value/Average Software Units Price = Legitimate Software Units**

In 2011, IDC implemented several measures to validate its calculations of average software unit price. Analyst teams in 25 countries have been asked to provide additional information on software price by category and estimates of acquisition type (e.g. retail, volume-license, free/open source) to serve as a cross-check against IDC's computed values. Rotating the countries for which information is collected each year will allow IDC to recalibrate software prices periodically, providing a more accurate estimate of legitimate software units from industry revenues.

Finally, subtracting the number of legitimate software units from the total software units reveals the number of unlicensed software units installed during the year.

### **Total Software Units Installed – Legitimate Software Units = Unlicensed Software Units**

This process provides the underlying data for the basic piracy rate equation.

#### *Calculating the Commercial Value of Pirated Software*

The commercial value of pirated software is the value of unlicensed software installed in a given year, as if it had been sold in the market. It provides another measure of the scale of software piracy and allows for important year-over-year comparisons of changes in the software piracy landscape.

It is calculated using the same blend of prices by which IDC determines the average software unit price, including: retail, volume license, OEM, free, open-source, etc. The average software unit price is lower than retail prices one would find in stores.

Having calculated the total units of software installed, as well as the number of legitimate and unlicensed software units installed and the average price per software unit, IDC is able to calculate the commercial value of unlicensed software.

### **Number of Unlicensed Units Installed x Average Software Unit Price = Commercial Value**

#### *Which Software Is Included*

The BSA Global Software Piracy Study calculates piracy of all software that runs on personal computers — including desktops, laptops, and ultra-portables, including netbooks.

It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. The study also takes into account the availability of legitimate, free software and open-source software, which is software that is licensed in a way that puts it into the public domain for common use. It is typically free but can also be used in commercial products.

The study excludes software that runs on servers or mainframes and routine device drivers, as well as free downloadable utilities, such as screen savers, that would not displace paid-for software or normally be recognized by a user as a software program.

It includes software as a service if it is paid for, but excludes free, Web-based services that might supplant the need for a paid-for package to be installed on a PC. Software sold as part of a legalization program — such as a bulk sale to a government to distribute to schools — is included in the study.

For more information, see <http://portal.bsa.org/globalpiracy2011/methodology.html>.

## **ENTERTAINMENT SOFTWARE**

In select countries, the Entertainment Software Association (ESA) provides rankings to demonstrate anecdotally the growth of online game piracy through P2P networks. The methodology underlying these estimates is as follows:

Vendors for ESA's online enforcement program monitor for connection activity involving select ESA members' leading game titles on major public P2P networks. The data is broken down, by country, based on the country of operation of the ISP.

## **MOTION PICTURES**

In select countries, the Motion Picture Association of America (MPAA) has provided estimates regarding activity around unauthorized copies of major U.S. movies on major peer-to-peer protocols during 2012. 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;
- Legitimate sales or other revenue;
- Enforcement data and anti-piracy developments;
- Where possible, economic indicators, professional surveys and academic studies of piracy or counterfeit goods.

Any monetary figures as to harm to the music industry in most cases reflect estimates of the level and value of pirate sales of U.S. repertoire. This does not take into account downstream (or value chain) losses from high piracy levels acting as a drag on the economic development of legitimate markets. Where possible, losses and piracy rates occurring via online and mobile networks are reported and would be so designated in the text of the country report.

**APPENDIX C: CHART OF COUNTRIES' SPECIAL 301 PLACEMENT (1989-2012)  
AND IIPA 2013 SPECIAL 301 RECOMMENDATIONS**

USTR 301 PLACEMENT (as of April/May of each year)																										
COUNTRY	IIPA Recommendation February 2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989	
Albania	SM																									
Algeria		PWL	PWL	PWL	PWL	WL																				
Argentina	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	PWL	PWL	WL	WL	WL	WL	
Armenia												WL	WL	WL												
Australia															WL	WL	WL	WL		WL	PWL	PWL	PWL			
Austria																OO	OO									
Azerbaijan									WL	WL	WL	WL	WL	WL												
Bahamas		OL <sup>1</sup>						WL	WL	PWL	PWL	WL + OCR	OCR	OCR												
Bahrain																WL	WL	WL	WL							
Bangladesh																										
Barbados		OL <sup>1</sup>																								
Belarus	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO										
Belize							WL	PWL	WL	WL																
Bolivia		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO	WL	OO								
Bosnia and Herzegovina																										
Brazil	WL	WL	WL	WL	WL	WL	WL + OCR	PWL	PWL	PWL	PWL	PWL	WL	WL	WL		WL	WL	PWL	OO	PFC	PWL	PWL	PWL	PWL	
Brunei		WL	WL	WL	WL																					
Bulgaria	WL							WL	WL	WL							PWL	WL	OO	OO						
Burma (Myanmar)																										
Cambodia																										
Canada	WL	PWL	PWL	PWL	PWL	WL	WL	WL + OCR	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO		WL	WL	WL	WL
Chile	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	
China (PRC)	PWL+306	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													
Costa Rica	PWL	WL	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	WL	PWL	PWL	PWL	PWL	PWL	WL	OO								
Ecuador	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL		WL	WL	PWL	PWL	WL				WL	WL			
Egypt	WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	PWL	WL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	WL	PWL	PWL	WL	WL	WL	
El Salvador																		WL	WL	WL	WL	WL				
Estonia	SM																OO									
European Union		OL <sup>4</sup>						WL	WL + OCR	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	
Fiji					OCR																					
Finland		WL	WL	WL	WL																					
Georgia													OCR													
Germany		OL <sup>3</sup>															OO	OO	OO	OO	OO		WL	WL		
Greece	WL	WL	WL	WL	WL	WL						WL	WL	PWL	WL	WL	WL	WL	WL							
Guatemala		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	WL										
Honduras																	WL	WL	OO	OO	OO					
Hong Kong	SM															OCR	WL	WL	OO							
Hungary					WL	WL	WL	WL	WL	WL	WL	PWL	PWL	WL	WL	OO	OO					PWL	PWL	WL		
Iceland																										

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USTR 301 PLACEMENT (as of April/May of each year)																									
COUNTRY	IIPA Recommendation February 2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989
India	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PFC	PFC	PFC	PWL	PWL
Indonesia	PWL	PWL+GSP	PWL	PWL	PWL	WL	WL	PWL + OCR	PWL + OCR	PWL	PWL	PWL + OCR	PWL	WL	PWL	PWL	PWL	PWL	WL						
Ireland														WL	WL	WL	WL	OO							
Israel	WL	PWL (9/12 to WL)	PWL	Pending	PWL + OCR	PWL + OCR	PWL	PWL	PWL	WL + OCR	WL	PWL + OCR	PWL	PWL	PWL	PWL	WL	OO	OO	OO					
Italy	WL	WL	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL + OCR	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Jamaica		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL									
Japan		OL <sup>3</sup>											OCR		WL	WL	WL	PWL	PWL	PWL	WL	WL	WL	WL	WL
Jordan																WL	WL	WL	OO	OO					
Kazakhstan	WL								WL	WL	WL	WL	WL	WL			OO								
Kenya																									
Kuwait	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	WL	WL	WL	WL	PWL	PWL	WL	WL	OO						
Kyrgyz Republic													OCR												
Laos																									
Latvia								WL + OCR	WL	WL	WL	WL	WL	WL											
Lebanon (GSP)	WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	WL	OO									
Lithuania							WL	WL	WL	WL	WL	WL	WL	WL											
Luxembourg																	WL								
Macau													WL	WL	PWL	PWL									
Macedonia																									
Malaysia	SM	OFF	WL	WL	WL	WL	WL	WL	WL	WL + OCR	WL	WL	PWL	PWL	OCR									WL	WL
Malta	SM																								
Mexico	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OCR			WL	OO	OO	OO							PWL
Moldova	SM													WL											
Morocco																									
Netherlands																OO									
New Zealand		OL <sup>3</sup>										WL	WL		WL							WL	WL		
Nicaragua																OO	OO								
Nigeria																									
Norway		WL	WL	WL	WL	WL																			
Oman														WL	WL	WL	WL	WL	OO						
Pakistan	WL	PWL	PWL	PWL	PWL	PWL	WL + OCR	WL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL
Palestinian Authority														OCR											
Panama																OO	WL	OO		OO					
Paraguay	SM	306	306	306	306	306	306	306	306	306	306	306	306	306	306	PFC	PWL	WL	OO	OO			WL		
Peru		WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	WL	WL	WL	WL	WL	WL	WL	WL		
Philippines	SM	WL	WL	WL + OCR	WL + OCR	WL + OCR	WL	WL	PWL + OCR	PWL	PWL	PWL + OCR	PWL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	WL	WL	WL
Poland		OL <sup>3</sup>			WL + OCR	WL	WL	WL	WL	WL + OCR	PWL	WL + OCR	WL	PWL	WL	WL	WL	WL	WL	WL	PWL	PWL			
Portugal																		OO							WL
Qatar												WL		WL	WL	WL	OO	OO	OO						
Romania	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	OO	OO	OO	WL						
Russian Federation (GSP)	PWL	PWL	PWL	PWL	PWL	PWL	PWL + OCR	PWL + GSP	PWL + OCR	PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL + OCR	WL	OO					
San Marino																	WL								
Saudi Arabia	WL				WL + OCR	WL	WL	WL + OCR	WL + OCR	WL	WL	WL	WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	WL	WL	WL	PWL

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USTR 301 PLACEMENT (as of April/May of each year)																										
COUNTRY	IIPA Recommendation February 2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989	
Serbia and Montenegro																							WL	WL	WL	
Singapore														WL	WL	WL	WL	WL	WL	OO						
Slovak Republic									WL	WL	WL	WL	WL													
Slovenia														OCR												
South Africa															WL	WL		OO	WL							
South Korea		OL <sup>3</sup>				WL	WL	WL	WL	PWL	WL + OCR	WL	PWL	PWL	WL	WL	WL	PWL	PWL	PWL	PWL	PWL	WL	WL	PWL	
Spain	WL	OFF	WL	WL	WL	WL								WL	WL	OO				WL	WL	WL	WL	WL	WL	
Sri Lanka																										
Sweden															WL	WL	WL									
Switzerland	WL	OL <sup>2</sup>																								
Taiwan	SM	OL <sup>3</sup>				WL (then OFF due to OCR)	WL	WL	WL	PWL + OCR	PWL	PWL	PWL	WL	WL			OO	WL	WL	PWL	PFC	WL	WL	PWL	
Tajikistan	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL												
Thailand	WL+OCR	PWL	PWL	PWL + OCR	PWL	PWL + OCR	PWL	WL	WL	WL	WL	WL + OCR	WL	PWL	PFC	PFC	PFC	PWL	PWL							
Trinidad & Tobago		OL <sup>1</sup>																								
Tunisia																OO										
Turkey	WL	WL	WL	WL	WL	WL	PWL	PWL	PWL	PWL	WL	WL	WL	PWL	WL	WL	WL									
Turkmenistan	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL												
UAE	WL												WL	OCR	WL											
Ukraine	PFC	PWL+GSP	WL	WL	WL	WL	PWL	PWL	PFC + OCR	PFC	PFC	PFC	PFC	PWL	PWL	WL										
Uruguay									WL	WL	WL	PWL	PWL	WL	WL	OO	OO									
Uzbekistan (GSP)	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL	WL												
Venezuela		PWL	PWL	PWL	PWL	PWL	PWL	PWL	PWL	WL	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	WL	OO	OO							
Yemen																OO										

- PFC: Priority Foreign Country
- PWL: Priority Watch List
- WL: Watch List
- OO: Other Observations (an informal listing formerly used by USTR).
- SM: Special Mention
- OCR: Out-of-Cycle Review to be conducted by USTR
- GSP: GSP IPR review ongoing, except in Ukraine and Indonesia where GSP IPR review initiated June 2012.
- DS: Dispute Settlement
- OL: Other Listing - "Section 1. Developments in Intellectual Property Rights Protection and Enforcement"
  - <sup>1</sup> Trends in Trademark Counterfeiting and Copyright Piracy
  - <sup>2</sup> Piracy over the Internet and Digital Piracy
  - <sup>3</sup> Supporting Pharmaceutical and Medical Device Innovation through Improved Market Access
  - <sup>4</sup> WTO Dispute Settlement

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