

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®



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Submitted to www.regulations.gov

Jennifer Choe Groves
Senior Director for
Intellectual Property and Innovation
Office of the U.S. Trade Representative
600 17th Street NW
Washington, D.C. 20508

Re: Docket: USTR-2009-0001
Philippines: Special 301 Out-Of-Cycle Review
IIPA Comments on the Status of Copyright
Protection and Enforcement
74 Fed. Reg. 51215 (October 5, 2009)

Dear Ms. Groves:

This submission by the International Intellectual Property Alliance ("IIPA") responds to USTR's request for comments concerning "acts, policies and practices regarding the adequacy and effectiveness of intellectual property protection and enforcement" in the Philippines as part of the Out-of-Cycle review announced by USTR on April 30, 2009. In sum, while there are some indications of incremental positive change, piracy remains dominant in the market, and it is too early to view the situation in the Philippines as having improved significantly since IIPA's February 2009 Special 301 report. Therefore, IIPA still recommends that the Philippines be placed on the Special 301 Priority Watch List.

About the IIPA

The International Intellectual Property Alliance (IIPA) is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries in bilateral and multilateral efforts working to improve international protection and enforcement of copyrighted materials and open up foreign markets closed by piracy and other market access barriers. IIPA is comprised of seven member associations (listed in the letterhead below), which in turn represent over 1,900 U.S. companies producing and distributing materials protected by copyright laws throughout the world. IIPA has participated in the Special 301 process since its inception 20 years ago.

IIPA's February 2009 Submission on the Philippines

In IIPA's country report on the Philippines submitted to the U.S. Trade Representative as part of its February 2009 submission in the annual Special 301 process, we listed fourteen proposed



priority actions – both enforcement-related and legislative – that, if taken by the Philippine government, could lead to necessary improvements in copyright protection and enforcement in the Philippines.¹ The following lists many of those proposed actions and provides updates (as we are aware of them) and potential actions or points of engagement for the near term, and notes some additional actions which would improve copyright protection and enforcement in the Philippines.

Priority Actions Requested in 2009: Enforcement

- **Ensure search warrants are obtainable on a reasonable and timely basis consistent with international law.**

Update: We are unaware of any developments on the law of search warrants that would improve right holders' efforts to uphold their rights in the Philippines. One of the most problematic and frustrating aspects of the Philippine court system has been the *de facto* unavailability of search warrants in copyright cases due to constitutional challenges by defendants' counsel. Search warrants, raids and follow up prosecutions should be obtainable on a transparent, reasonable and timely basis, including for all kinds of physical piracy like optical disc and mobile device piracy, and should never be quashed without full transparency and notice to rights holders.

While not unique to copyright, recent cases such *Telmarc Cable*, in which a warrant was quashed notwithstanding that the police had clearly personally witnessed infringing activity, indicate a more systemic problem. The Philippines held IP Week activities (with coordination from WIPO) the week of October 26, 2009, including the 2009 IP Colloquium for the Judiciary on October 26, 2009, with special guest Supreme Court Chief Justice Reynato Puno. It is unknown whether any of the discussions centered on the often unavailability of search warrants or the ease with which they are successfully challenged in the Philippines.

- **Develop IP expertise in judges and prosecutors by re-establishing intellectual property courts and increasing speeds of dockets, enabling a significant number of pending cases to move forward in the system.**

Update: The Intellectual Property Office held a public hearing for stakeholders on August 10, 2009 to discuss the establishment of rules on IP litigation for two or three pilot IP courts which will have national jurisdiction and will divide IP caseloads. While a consultation with stakeholders originally scheduled for late September 2009 was postponed, the rules were presented by IPO to Philippine Supreme Court Chief Justice Reynato Puno at the 2009 IP Colloquium for the Judiciary for possible promulgation on October 23, 2009. Only time will tell whether the IP courts can be successfully established to achieve greater effectiveness in IPR enforcement through the judicial process in the Philippines. IIPA commends the government for taking up the issue of judicial reform and seeking stronger protection of copyright through establishing specialized IP tribunals. Greater focus should be placed on criminal process (in addition to civil process) so that a well-rounded judicial approach to piracy can be undertaken.

¹ See IIPA 2009 Special 301 report on the Philippines, posted at <http://www.iipa.com/rbc/2009/2009SPEC301PHILIPPINES.pdf>.



- **Remedy bottlenecks on inquests and preliminary investigations by the Department of Justice by streamlining signing procedures (now apparently limited to one or two officials with authority to sign).**

Update: We are unaware of any developments to deal with restrictive signing procedures in the Philippines.

- **Increase the number of investigations (including *ex officio*), raids and criminal proceedings against: mall owners and retail merchants engaged in piracy, including mobile device piracy; those engaged in illegal camcording of motion pictures; photocopy shops; large-scale pirate distributors; businesses engaged in corporate end-user piracy of software and other materials; and optical disc plant owners (in both unlicensed replicating plants and licensed plants).**

Update: On June 23, 2009, the IPO of the Philippines reported enforcement statistics for January to June 2009 on its website.² The report indicates that over three billion pesos (about US\$63 million) worth of “counterfeit goods and paraphernalia” had been seized between January and June 2009, including “three replicating machines, with a total estimated value of P200 million [about US\$4 million] which was intercepted during an operation jointly undertaken by the Bureau of Customs (BoC) and Optical Media Board (OMB) in May 2009.” The Philippine National Police (PNP) had the greatest haul (over two billion pesos) followed by OMB, BoC, and the National Bureau of Investigation (NBI). Taking these numbers as fact, it is still difficult to ascertain with certainty how this affects copyright, since product seized is not further broken down by category, nor does it indicate the size and scope of the overall piracy market, nor does it indicate the sources from which the pirate product was seized, e.g., small distributors versus source production pirate operations. It is noteworthy that IPO Philippines reports that the hauls through late June 2009 almost matched all of the seizures IPO Philippines reported for 2008.

The statistics reported focus on anecdotal seizures, which, while impressive, do not indicate whether such seizures are having an effect on the marketplace. In particular, for example, there is no reporting on outcomes of cases commenced out of any seizures, including those preceding the reporting period or those occurring during the reporting period. Without such follow-up, it is impossible to ascertain, for example, how many of those engaging in such piracy activities have been apprehended or whether they remain free to continue to engage in piracy activities.

The business software industry and others continue to receive good cooperation from the Pilipinas Anti-Piracy Team (PAPT). PAPT held a press conference on August 26, 2009 to commemorate its 4th anniversary. All three PAPT agencies were represented during the press conference, including NBI, OMB, and PNP. Since July 2008 to the present, PAPT has conducted ten BSA-initiated end-user raids, with all raids resulting in seizures. In addition, the OMB made visits to thirty companies suspected of using unlicensed BSA-member software. The

² “Government anti-piracy enforcement group confiscates over P3B worth of pirated goods from January to June 2009,” June 23, 2009, at <http://www.ipophil.gov.ph/>.



visits were not confined to Metro Manila and these efforts benefited software companies in terms of legalization of software usage inside businesses.

There still has been no apparent increase in raiding operations involved in burning, delivering and selling of recordable CDs and DVDs. Since copyright owners including record companies and motion picture studios never release their albums or movies legitimately on recordable discs, there should be no problem identifying pirate products on such discs. IIPA encourages authorities to target operations dealing in pirate copies on recordable discs, from the source to the sales point.

We have very little updated information on enforcement activities with regard to malls and actions against mall owners, pirate books and photocopy shops, or illegal camcording. Regarding mobile device and mobile network piracy, please see comments below.

- **Increase the capacity to investigate and eradicate P2P and other Internet-based piracy; implement current laws (like the E-Commerce law) and pass pending legislation to foster removal of infringing material or services from the Internet through imposing ISP liability and an effective notice and takedown system.**

Update: The Internet piracy situation in the Philippines has worsened. Previously, a high percentage of Internet access to infringing sites occurred through use of Internet cafés; thus, piracy activities online were limited geographically and to certain demographics. More recently, public accessibility to the Internet has increased dramatically using high speed connections. For example, high-speed Internet direct-to-home and through a wireless LAN have become popular, and plug-in USB LAN device costs only P995 (approximately US\$20). The proliferation of low-cost notebook computers (average of US\$ 410) and “wi-fi” hot spots has resulted in more people gaining access to the Internet in the Philippines. Therefore, regulation at the ISP level has become urgent, and IIPA continues to urge the Philippine government to formulate Internet regulations to foster ISP cooperation and effectively deal with infringing websites and services and P2P piracy activities. While industry notes that many of the infringing sites or services are hosted and registered outside of the Philippines, it still remains incumbent on the government to act; such an active approach, including takedowns and blocking sites engaged in blatant and serious piracy activities, has been successful in other markets in curtailing online infringing activities.

- **Address book piracy through closer monitoring of key areas selling pirated books, both on and off university campuses, and employ resources to locate and arrest fugitives in piracy cases.**

Update: We are unaware of any developments to deal with book piracy, including illegal copying on and around university campuses, in the Philippines.

- **Cease licensing new optical disc plants forthwith since the Philippines suffers from production overcapacity and closely monitor the activities of licensed plants which are known not to be used by the legitimate sector, or have previously been caught**



manufacturing infringing products, through regular inspections by properly-trained personnel.

Update: Other than the statistics provided by IPO Philippines on OMB seizures, we have few updates on recent OMB licensing, inspection, or enforcement activity. In order to enhance the effectiveness of enforcement against pirate optical disc operations, IIPA encourages the government to draft and adopt rules allowing monitoring of work of the OMB by the public. This should include the names of entities licensed by OMB to produce discs, which should be published so that the industry can base its anti-piracy work on reliable licensing information of optical disc plants. Also, as recommended previously, OMB should pay surprise visits to all optical disc plants, preferably in the presence of witnesses from the private sector.

- **Allow right holders to participate in investigations and accompany inspectors.**

Update: IIPA encourages that as part of the draft rules regarding OMB activities that it be stipulated that representatives from the private sector will be permitted to accompany OMB on raids and/or inspections on replicating plants. The software industry has had better experiences than others participating with member agencies of PAPT in carrying out investigations.

- **Augment anti-camcording enforcement efforts.**

Update: The Philippines has become a regional hotspot for illegal camcording of movies at cinemas. The local Metro Manila and Quezon City governments, and some government officials (e.g., the head of the OMB) were early to recognize the scope of harm caused by illegal camcording, and IIPA recognizes their efforts to curtail it through targeted enforcement and the issuance in Manila and Quezon City of local ordinances in 2008 making it illegal to use an audiovisual recording device in a movie theater. IIPA now understands that the Philippine Congress is poised to pass legislation (discussed below) to combat illegal camcording of films in movie theaters.

- **Curb Pay TV (cable and satellite) piracy by shutting down some of the estimated 800 pirate cable systems, and/or through license or permit revocations/suspensions.**

Update: We are unaware of any developments to deal with cable and satellite TV piracy. Pirate cable systems should be immediately shut down, or have licenses or permits revoked to curb Pay TV (cable and satellite) piracy.

- **Expedite the collection of public performance royalties on the broadcast or communication to the public of sound recordings by removing obstacles to collection and assisting in information dissemination to dispel public confusion.**

Update: Recently IPO Philippines held consultations regarding the control of collective management organizations (CMOs) which collect public performance royalties on the broadcast or communication to the public of sound recordings, and forced them to stop their commercial operations. The chief record producers' licensing entity (MVP) has as a result been prohibited



from conducting its licensing activities on behalf of record companies since October 2008. Collective licensing entities (also called Collective Management Organizations CMOs) should be permitted to operate in a commercial manner, free from interference from the government.

Priority Actions Requested in 2009: Legislation

- **Pass as a matter of first priority the copyright law amendment Bill (SB 880 and HB 03741) aimed at implementing the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty and making other positive changes.**

Update: The copyright amendment bill was approved at the House Subcommittee level on August 11, 2009. Key sponsoring Congressmen have indicated they will do what they can to pass the bill by November 30, citing a small window they have to pass pending bills. The situation is not as good in the Senate where the bill is stalled, since its first reading in September 2007. The Copyright Amendment Bill should be certified as urgent and passed in the current legislative window. IIPA urges swift passage of the Bill, which will ensure implementation in the Philippines of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty and make other positive changes.

- **Enact national legislation (HB 04117) to halt illegal camcording of motion pictures, and promote and support implementation of the law and city ordinances through training for PAPT.**

Update: As noted, House Bill 5699 passed the House in a third reading in February 2009. The Bill has made its way to the Senate, where it reportedly is awaiting a report by the Senate Subcommittee on Public Information and Mass Media. The intention is to raise it in the Senate plenary soon after the subcommittee report is prepared. Since the window for legislation in the current session of Congress is closing, IIPA urges swift action to move on this Bill, which will have a very positive effect against illegal camcording in the Philippines and will set a positive example for the region and indeed worldwide.

Other Issues

In addition to the above, the following other emerging issues should be noted:

- **The Philippine government should formulate an anti-piracy enforcement plan targeting piracy activities over the mobile networks.**

Mobile phone subscribers in the Philippines were estimated to exceed 68 millions by the end of 2008, fifth highest in Asia. The record industry in the Philippines has legitimate business with all three major telecommunication companies. It has been difficult, however, to convince telecommunication companies to block access to infringing wireless application provider (WAP) sites on a voluntary basis. The government needs to think and act creatively to address piracy on mobile networks.



One possibility is to empower the National Telecommunication Commission (NTC) or the Commission on Information and Communications Technology (CICT) to act on piracy and other copyright issues over mobile networks.³ IIPA urges the Director General of IPO to consider providing NTC or CICT with the ability to act on such copyright issues so that copyright materials will enjoy better protection over mobile networks.

We also believe anti-piracy enforcement work carried out by OMB could be enhanced by re-defining the scope of OMB to include mobile device piracy. For example, stores are engaged in selling devices such as iPods, microchips, mobile phones, MP3 devices, and other devices on which pirated content is pre-loaded, loaded after sale, or “downloaded for a fee.” In order to enable enforcement actions against such activity, the OMB law should be amended to include at least all physical containers of intellectual property. In addition, places such as internet cafés and establishments where pirated software and copyright products can be found should also be listed within OMB’s enforcement power.

- **The Philippine government should confirm that Customs will no longer levy duties on foreign book imports.** In 2009, IIPA members began to hear of cases in which Philippine Customs was charging levies on foreign book imports. This would be a violation of the Philippines international commitments. However, it appears that in May 2009, the Office of the President instructed the Department of Treasury to revoke Department Order 17-09 which imposed the duties on imported books. The situation, however, merits clarification. The government also should not unreasonably delay shipments by inspections or impose undue costs for storage.

Respectfully submitted,

Michael Schlesinger
International Intellectual Property Alliance (IIPA)

³ CICT was created by virtue of Executive Order No. 269 (<http://www.cict.gov.ph/images/files/eo269.pdf>). Section 4 (1) of the EO stipulates that CICT shall “administer and enforce all laws, standards, rules and regulations governing ICT, and in coordination with the Intellectual Property Office (IPO) ensure the protection of ICT-related intellectual property rights.”