

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2001 SPECIAL 301 REPORT

# PHILIPPINES

### EXECUTIVE SUMMARY<sup>1</sup>

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The Philippines is rapidly becoming a central battlefield in the increasingly intense campaign against optical media piracy in Southeast Asia; but the country remains ill-prepared to fight this battle. Pirate production capacity in the Philippines continues to increase, as pirate syndicates flee less hospitable jurisdictions; both imports and exports of unauthorized digital copies move freely across the country's porous borders; and the Philippine domestic market remains heavily infiltrated by pirate product in all segments, from software to audio-visual, music to books. Steps toward the enactment of regulatory controls on the optical media business, and toward an updated legal framework to accommodate ecommerce and to outlaw online piracy, are commendable; but the weak link remains enforcement. The country's investigative, prosecutorial, and judicial systems are underfunded, overwhelmed by a relentless tide of piracy, and seemingly unable to muster the political will needed to remove procedural bottlenecks and reduce endless delays. At the end of the process, deterrent punishment is never forthcoming. Meanwhile, the country lags in meeting its international obligations under TRIPS, especially with regard to enforcement, and it has never successfully dealt with the legacy of the Marcos-era decrees that blighted its legitimate book market. The Philippines should be placed on the Priority Watch List for 2001 to underscore U.S. insistence that these long-standing and serious problems be effectively tackled.

The Philippines currently participates in the U.S. Generalized System of Preferences (GSP) Program, which allows duty-free imports of certain products into the U.S. from developing countries. In the first 11 months of 2000, over \$687 million of imports from the Philippines entered the U.S. duty-free under this program. In order to qualify for such unilaterally granted trade preferences, USTR must be satisfied that the country meets certain discretionary criteria including whether it provides "adequate and effective protection for intellectual property rights." The Philippines' failure to address effectively its copyright piracy problems creates serious questions about whether it meets this criterion for continuing favorable treatment under the GSP program.

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<sup>1</sup> For more details on Philippine's Special 301 history, see IIPA "History" appendix to filing.

**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1995 - 2000**

| INDUSTRY                                       | 2000         |       | 1999         |       | 1998         |       | 1997         |       | 1996         |       | 1995         |       |
|--|--------------|-------|--------------|-------|--------------|-------|--------------|-------|--------------|-------|--------------|-------|
|  | Loss         | Level |
| Motion Pictures                                | 25.0         | 70%   | 18.0         | 65%   | 18.0         | 65%   | 18.0         | 65%   | 22.0         | 65%   | 26.0         | 90%   |
| Sound Recordings /<br>Musical Compositions     | 1.3          | 33%   | 2.0          | 20%   | 3.0          | 20%   | 4.0          | 20%   | 3.0          | 20%   | 3.0          | 22%   |
| Business Software<br>Applications <sup>2</sup> | 28.2         | 66%   | 26.7         | 70%   | 25.4         | 77%   | 36.0         | 83%   | 56.7         | 92%   | 33.2         | 91%   |
| Entertainment Software <sup>3</sup>            | 41.0         | 98%   | 23.8         | 89%   | 24.7         | 90%   | 21.3         | 88%   | 26.0         | 86%   | 28.0         | 90%   |
| Books  | 44.0         | NA    | 44.0         | NA    | 39.0         | NA    | 50.0         | NA    | 70.0         | NA    | 70.0         | NA    |
| <b>TOTALS</b>                                  | <b>139.5</b> |       | <b>114.5</b> |       | <b>110.1</b> |       | <b>129.3</b> |       | <b>177.7</b> |       | <b>160.2</b> |       |

## OPTICAL MEDIA PIRACY CONTINUES TO FLOURISH

Optical media piracy, which took root in the Philippines in 1999, flourished and grew in 2000. This increasingly serious problem -- the production, distribution and sale of unauthorized music CDs, video CDs, and CD-ROMs containing illegal copies of business software applications and/or entertainment software as well as literary material -- damages the legitimate market for every segment of the copyright industries. It dims the prospects of success for authors, musicians, and other creators, both Filipino and foreign; it distorts the Philippines' domestic market for copyrighted materials, damaging legitimate retailers, exhibitors and other distributors; and it denigrates the country's reputation among its neighbors, as the Philippines increasingly becomes identified as a source of pirate product sold in other Southeast Asian markets.

The presence of pirate VCDs in the Philippines market continues to grow dramatically, and is the principal reason that the Motion Picture Association (MPA) reports an increase in the level of video piracy from 65% to 70% for 2000. Pirate copies of popular titles appear on the market, especially in Metro Manila but increasingly in the provinces as well, prior to the date of legitimate theatrical release, and remain on sale, damaging the prospects both for theatrical exhibition and for legitimate release in home video format. For instance, at notorious pirate stalls in the Greenhills district of San Juan, a Manila suburb, pirate VCD versions of films not yet legitimately released in the Philippines are available for PP100 (US\$2.10). Unlike in some other Southeast Asian countries, the VCD format has not yet supplanted VHS videocassettes; but VCD piracy is extending the life of the pirate market in the older format. Pirate VCD's are increasingly used as digital master copies for the production of unauthorized videocassettes, which are sold through the country's estimated 3100 unregistered and unlicensed video retail outlets.<sup>4</sup>

<sup>2</sup> BSA estimates for 2000 are preliminary. In IIPA's February 2000 Special 301 submission, BSA's level figure of N/A was also reported as preliminary. This number was finalized in mid-2000 and is reflected above.

<sup>3</sup> IDSA estimates for 2000 are preliminary. Changes from previous estimates reflect, in part, changes in methodology aimed at obtaining more accurate estimates.

<sup>4</sup> The rise of VCD piracy should not obscure the fact that videocassette piracy remains a severe problem in the Philippines. Large-scale duplication and distribution operations for video piracy are found in major

Optical media piracy is the scourge of other copyright industry sectors in the Philippines as well. For the same PP100, a Greenhills shopper can also buy a pirate music CD or a CD-ROM compilation of business software applications, the latter selling at barely 1% of its legitimate retail price.<sup>5</sup> Pirate CDs are also available in many large shopping malls, often at prices as low as PP50 (US\$ 1.05). The Muslim barter area in Quiapo, Manila is flooded with pirate music product, and the police, fearing armed conflict, do nothing to stop it. The Recording Industry Association of America (RIAA) estimates that one-third of the recorded music market in the Philippines is pirate, up from an estimated one-fifth in 1999. Estimated piracy losses are down to \$1.3 million, mainly because of the drop in pirate prices brought on by the glut of illegal product. The growth of the pirate market in computer games on CD-ROM for play on PCs has been especially marked, and is reflected in the rising estimated level of piracy for entertainment software (98% in 2000). Retailers are canceling their orders for legitimate copies of games and bowing to consumer demand for the far cheaper pirate copies. The Interactive Digital Software Association (IDSA) estimates losses due to entertainment software piracy at \$41 million for 2000. Print publishers also feel the impact of optical media piracy, as their CD compilations are copied without authorization and sold far below legitimate retail prices.

Until recently, the vast majority of pirate optical media products were smuggled or otherwise imported into the country from abroad. This is no longer the case. There are believed to be at least eighteen active production lines for optical media products in the Philippines, more than twice as many as a year ago, and perhaps many more than that. Additional lines are known to be en route from Hong Kong, Macau and elsewhere. Much of this burgeoning capacity appears to be devoted to pirate production. The reason for this growth is apparent: as neighboring countries such as Malaysia move, however slowly, toward more effective enforcement against pirate optical media production, the Philippines becomes an increasingly attractive destination for international criminal syndicates, seeking a safer haven for their illegal factories.

Indeed, Philippines-based optical media piracy is clearly an international affair. Technicians from Hong Kong, Singapore, Malaysia and China operate the pirate facilities, and foreign financing appears to be in control of the operations, some of which seem to have been relocated from Malaysia, Macau and elsewhere. Besides supplying the Philippines market, the plants produce for export to other destinations around the region. Some are even located in government-sanctioned Special Export Zones, to facilitate the importation of equipment and raw material and the export of finished product. The Philippines also still imports a considerable quantity of pirate optical media product, especially in the southern part of the country, where Muslim extremist groups appear to be involved in the distribution of pirate product imported from nearby Malaysia. The recording industry estimates that at least half of pirate music CDs circulating in the Philippines are locally manufactured; the rest are imported from Malaysia, Taiwan, Indonesia, and Hong Kong.

Enforcement statistics help tell the tale of the continuing growth in pirate optical media production. As late as November 1998, the haul from the largest raid against a VCD replication facility in the Philippines was a mere 450 units. In September 1999, a National Bureau of Investigation (NBI) raid in the Pasig area of Metro Manila netted some 4 million pirate optical

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population centers. Pirate videocassette titles include films that were released only days earlier in U.S. theaters and have not yet appeared in theaters in the Philippines.

<sup>5</sup> See Andrade-Jiminez, "Focus – Computer Software, Video CD Piracy," *Business World* (Philippines), June 22, 2000, at 1.

discs (both music and video), 70 stampers (masters for replication), and two full production lines. A series of coordinated raids run between October 1999 and June 2000 hit three factories and five supporting warehouses in Metro Manila, seizing over 800,000 units of pirate product, mostly audio and video CDs, including recordings by Kenny Rogers, Cristina Aguilera, and Mariah Carey. Finally, a September 2000 raid carried out within the Clarke Special Economic Zone shut down a factory that was in the midst of producing pirate videogames, probably for export. Stampers for making additional unauthorized discs of musical recordings, CD-ROM videogames, and films such as "Mission Impossible 2" and "X-Men" were seized at this facility, which apparently had been in operation for several months, producing primarily for export. During 2000, seizures of pirate videogames in CD-ROM format for use on PlayStation consoles totaled 775,000 units, a 37-fold increase over the 1999 figure.

While such enforcement actions are essential and must be continued, by themselves they cannot be sufficient to make any appreciable impact on the growing optical media piracy problem that plagues the Philippines. Lacking are two key ingredients that are essential in the formula for success in the fight against these well-organized criminal enterprises. First, new legal tools are needed to crack down on pirate optical media production. Second, as discussed in more detail in the following section, both existing laws and the new optical media regulatory regime must be effectively enforced through adequately funded and motivated law enforcement and investigative agencies, efficient and responsive prosecutors, and expeditious court proceedings that culminate in the imposition of deterrent penalties.

The Philippines made notable progress in 2000 toward supplying the first of these two missing ingredients. The country still needs a comprehensive regulatory regime for the optical media business. This regime must cover the importation of equipment and raw materials for the mastering and replication of all optical media products; must provide for the licensing of all production sites, subject to spot inspections of their facilities and records, including production orders; and must require the use of the Secure Identification (SID) code or similar unique markings on all masters and copies of optical media products manufactured in the country. Legislation recently adopted by the Philippine House of Representatives, the Entertainment Media Regulatory and Anti-Piracy Act (EMRP), meets many of these criteria. However, some questions remain about the legislation's impact on audiocassette manufacturing; its retail licensing and reporting requirements; its applicability to pirate production and distribution of business software applications; and whether its enforcement provisions adequately spell out the surprise inspection authority of the proposed enforcement agency, an expanded version of the existing Video Regulatory Board. Recent political turmoil and impending elections in the Philippines dim the prospects for a rapid legislative outcome. However, if the remaining questions are promptly resolved, and if the legislative process on the EMRP can be speedily completed, the Philippines will have put in place a regime that enables the close monitoring of the operations of existing optical media production facilities in the country, and that will discourage the regional criminal syndicates from opening new "underground" plants.

## **ENFORCEMENT REMAINS THE WEAK LINK**

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Enforcement against copyright piracy in the Philippines remains a tedious, frustrating and all too often risky business. All enforcement agencies in the country suffer from a chronic lack of resources to carry out enforcement actions, which has limited their effectiveness. The most recent example is the zeroing out of the PP 5 million (US\$105,000) enforcement budget of the Video Regulatory Board. The government must not only resist the temptation to cut back on IPR enforcement on budgetary grounds, but should be encouraged to increase the resources

available to enforcement agencies, both within and outside Metro Manila. Adequate resources are particularly needed at a time when the level of violence accompanying pirate operations remains high. For instance, in response to a raid on vendors of pirate CDs in Greenhills on April 15, 2000, some 200 vendors and their supporters rioted, and in the resulting fracas three anti-piracy investigators were injured and a senior police officer died of a heart attack.<sup>6</sup>

Other problems plague enforcement. Numerous enforcement agencies share responsibilities in fields such as videocassette and cable piracy, and interagency turf battles and a lack of coordination undermine the efforts of many dedicated officers. The Presidential Inter-Agency Committee (IAC-IPR) set up to improve coordination is essentially dormant. The track record of Philippines Customs in particular needs improvement. Large volumes of pirate material continue to flow into the Philippines from abroad. Customs' efforts at interdiction are sporadic, at best, although they did make some seizures at the international airport last year. The failure of the Customs Commissioner to issue regulations on border enforcement is a prominent symptom of the problem.

But the fundamental weaknesses of the Philippine enforcement system extend far beyond lack of resources or shortcomings of coordination. While IIPA has frequently called attention to the judicial bottleneck caused by the Philippines' highly inefficient court system, in fact copyright owners encounter a long series of obstacles that make it nearly impossible to move an enforcement case through the system to achieve an appropriate outcome. This systemic failure to deliver effective enforcement is the best explanation for why piracy is a thriving business throughout the Philippines.

The first problem encountered is at the investigative level, when law enforcement officers seek a search warrant to raid a pirate warehouse, factory or other facility. Delays of up to a week in obtaining issuance of a warrant are not uncommon, and during that time word of the investigation often leaks and the contraband is moved or destroyed. Raids are commonly compromised by leaks even when warrants are expeditiously issued. Criminal enforcement against business software piracy faces an even more formidable hurdle at this point in the process: the requirement that the enforcement officer seeking a search warrant swear to personal knowledge that a crime is being committed. This is almost never the case when a corporation is making numerous unauthorized copies of business software for its internal use; in these cases, the source with first-hand knowledge is a private informant, often a former employee. Most other jurisdictions, by contrast, allow a warrant to be issued based on an affidavit from the informant accompanied by indicia of reliability. Until the Philippines modifies its practice to comply with these international norms, business end-user piracy by companies or other institutions, while profoundly damaging to copyright owners and clearly illegal under Philippines law, will remain virtually immune from criminal enforcement. Only two or three such cases were initiated last year.

Investigative malfeasance provides the next barrier against effective enforcement. In at least one instance, enforcement officials took the seized products and sold them to members of the public. Efficient follow-up investigation after a raid is the exception, not the rule.

The third bottleneck is in the prosecutor's office at the Department of Justice, which is overloaded with cases and saddled with procedural requirements that defendants can exploit to delay the filing of a prosecution. Each formal complaint must be investigated by a

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<sup>6</sup> See Billboard, May 26, 2000, at 62.

prosecutor in an elaborate procedure that can take months to complete, and the decision to go forward with a prosecution is subject to appeal to the office of the Secretary of Justice. The Business Software Alliance (BSA), for example, only last month (January 2001) received a final decision from the Department of Justice refusing to prosecute a retailer who was caught with 2800 units of unlicensed software, in a raid that took place in November 1995 – 62 months earlier. Despite the investigative apparatus currently in place, in fact prosecutors rarely conduct much additional investigation of the offenses which are the subject of the complaint.

Finally, if a piracy case manages to survive the obstacle course of raid, investigation and prosecutorial decisionmaking, it arrives at perhaps the most impenetrable bottleneck of all: the court system. Even when aggressive raiding is undertaken against infringers, the value of enforcement is substantially undermined by the absence of judicial follow-through, manifested in chronic court backlogs, the failure to impose deterrent penalties, and delays of up to six or seven years before final disposition -- if it ever occurs. Not surprisingly, many defendants simply disappear at some point during the long odyssey of their cases.

To deal with this problem, in 1996 the Philippine Supreme Court designated 48 courts nationwide as Special Intellectual Property Rights Courts. The copyright industries welcomed this step, have participated in IPR seminars for the courts' judges and for assigned prosecutors, and have initiated some test cases to evaluate the effectiveness of special guidelines promulgated for these IPR courts to try to obtain expeditious decisions. To date, these attempts at judicial reform have been a failure. In September 2000, the Philippine Supreme Court expanded the designation to include 24 municipal courts, half in Metro Manila. This change has had no discernible positive effect. Coordination between designated judges and the rest of the court system continues to be a problem. For example, search warrant applications in piracy cases are not necessarily heard by a designated IPR judge, even if one is sitting in the geographic jurisdiction in which the warrant is sought; an undesignated judge may be assigned to make this crucial decision instead.

At the end of the long road a piracy case must travel in the Philippines is sentencing. The Intellectual Property Code, which came into force in 1998, authorized greatly increased criminal penalties for piracy, and these were beefed up still further in the ECommerce legislation discussed below. But in practice, deterrent sentencing remains a mirage. For example, BSA reports that there has not been a single criminal conviction for business software piracy in the 38 months since the Code took effect. Similarly, there were no known convictions under the Code in music piracy cases last year.

After five years, the copyright industries are still working and hoping for specialized IPR courts in the Philippines that are adequately funded and staffed, that expeditiously process piracy cases, and that consistently hand down the increased deterrent sentences authorized by Philippine law, but this goal seems no closer to attainment than before. While some of its ASEAN neighbors have made great strides in improving the performance of their courts in piracy cases, the Philippines remains mired in inefficiency and delay. The Philippines must address this problem on an urgent basis if it is ever to make significant progress in its fight against copyright piracy. In particular, any initiatives it takes to tackle the optical media piracy problem will be fatally compromised unless it can improve substantially on the current track record. It remains the case that, to date, all the raids on optical disc factories have not produced a single criminal conviction for copyright piracy.

For the Philippines, improving enforcement at every stage of the process is not simply a worthy goal or a matter of national pride. It is also an international obligation that the country took on when it joined the World Trade Organization, and that came into force in 2000 when it became subject to the TRIPS Agreement. Under Article 41 and 61 of TRIPS, for example, the Philippines is required to impose deterrent sentences on commercial copyright pirates. Its failure to do so must be remedied as soon as possible.

Another enforcement problem that particularly afflicts the business software sector may also be ripe for challenge under TRIPS. As in other countries, much of the business software piracy in the Philippines is committed by end-users, who make multiple unauthorized copies of a single legitimate copy of a business application. This enables the program to be installed on, or made accessible to, computers throughout a business, educational facility, or other institution, without purchasing a license for this arrangement from the copyright owner. Enforcement against institutional end-user piracy is extremely difficult without the power to conduct an unannounced search of an institution's computers for evidence of illegal copies -- evidence that could otherwise be destroyed with the touch of a button. Accordingly, Articles 41 and 50 of TRIPS require WTO member countries to make such search procedures available to copyright owners in civil cases without requiring notice to the target of the investigation.

Philippine law lacks clear, effective procedures for obtaining this essential provisional remedy. A request nearly a year ago from Philippine intellectual property officials to the Chief Justice of its Supreme Court seeking the issuance of court rules governing the availability of the remedy has, to our knowledge, produced no substantive result. Philippine authorities insist that the IP Code authorizes the issuance of provisional relief in civil cases on an *ex parte* basis. But as recently as December 26, 2000, a regional trial court specifically ruled to the contrary in a case brought by BSA. The failure to make civil *ex parte* searches available, combined with the difficulty described above in obtaining criminal search warrants in these cases, is a major roadblock to enforcement against institutional software piracy in the Philippines, a clear violation of the country's TRIPS obligations, and one of the key reasons why the incidence of end-user software piracy remains unacceptably high.

## **CABLE PIRACY REMAINS OUT OF CONTROL**

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Cable television piracy remains one of the most serious problems for the U.S. audiovisual industry in the Philippines. Hundreds of cable systems, especially those outside Manila, make unauthorized transmissions of new and recent Hollywood productions their standard fare. Cable piracy hurts all the legitimate markets for these products, including theaters and home video. So does the related problem of theft of home entertainment satellite signals. In the past, interagency squabbling virtually immobilized the enforcement effort against cable piracy. In 1998, the National Bureau of Investigation (NBI) executed a number of search warrants in five raids against provincial pirate cable systems, and used new administrative authority to seize cable head-end equipment used in unauthorized transmissions. However, other equipment not actually in use at the time of the raid was not seized. Furthermore, the expense of transporting and housing NBI investigators to outlying locations sharply limited the number of enforcement actions undertaken. Criminal copyright infringement cases have been filed in various parts of the country as a result of these raids, but none of these cases has yet proceeded to final disposition, and there have been no convictions.

The Philippine government's raids on pirate cable systems are to be commended. So is the more active role of the National Telecommunications Commission (NTC), which has

jurisdiction over broadcast stations. NTC has used this authority in the past to stop unauthorized broadcasts of U.S. motion pictures by stations in the southern part of the country. More recently, NTC has issued show-cause orders against operators suspected to be retransmitting stolen satellite TV signals, with some success. Close monitoring and compliance checks on cable TV systems have also contributed to a slight reduction in the cable piracy rate in the Philippines. However, at 50% that rate remains one of the highest in Asia. Increased enforcement and better interagency coordination are essential if this rate is to be reduced further. The number of raids should be increased, and their results should continue to be well publicized in order to discourage piracy by other cable systems. Deterrent penalties must be imposed by the courts on cable pirates.

The required longer term solution is to bring these provincial cable systems under meaningful regulation, so that systems which transmit copyrighted product without authorization can be heavily fined or shut down. Bills now pending in the House and Senate would accomplish this, as well as other needed reforms, such as substantially increasing penalties and giving legal protection to satellite signals. Enactment of such legislation, including protection for both unencrypted and encrypted signals, is long overdue.

## **PIRACY IN THE EDUCATIONAL SECTOR**

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Several forms of widespread copyright piracy are harming the prospects for legitimate U.S. products marketed to educators and students. Unauthorized photocopying of textbooks is widespread, especially in and around universities. Increasingly, pirates make illegal photocopy versions on order, to avoid maintaining or displaying pirate inventory. Some universities have issued memoranda to students prohibiting them from ordering such photocopying, but the problem persists.

Reprint piracy, long the nemesis of legitimate publishers, remains rampant. Although the Philippines is the second largest English-speaking market in Asia, its potential for sale of textbooks and reference books was essentially destroyed by the long-standing compulsory reprint license decrees (notably Presidential Decree 1203), which allowed Philippines publishers to reprint U.S. publications at will, with token compensation payable (although even that was often not paid). Although these decrees were repealed by enactment of the Intellectual Property Code (which went into effect over three years ago), they continue to cast a shadow over the publishing market. Authorizations (some issued after enactment of the new code, but before it came into force) from the Philippine government's Reprint Committee for local publishers to reprint current scientific, technical and medical books, without the permission of the U.S. copyright owner, apparently remain in effect. Although the Reprint Committee has finally been disbanded, this last gasp of the old system is unjustified and a flagrant violation of the Philippines' international obligations. All compulsory reprint license lists should be immediately rescinded, the ongoing validity of any such license formally terminated, and existing stocks of reprinted books should be brought under the control of the legitimate publisher.

The piracy of scientific, technical, and medical (STM) books continues to undermine legitimate sales in the Philippines. Pirate printers now participate in medical conventions, displaying original books but selling unauthorized bound photocopies. A particularly aggressive pirate was arrested twice during the same annual convention of the Philippine College of Physicians for selling her wares. For 2000, estimated losses to U.S. publishers in the Philippines were \$44 million, making the country the second largest book piracy haven in Asia.

Book piracy is not the only problem in the educational sector. Unauthorized copying of business software applications remains all too prevalent at for-profit training institutes in the Philippines.

## **INTERNET PIRACY AND E-COMMERCE: PROBLEMS AND OPPORTUNITIES**

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During 2000, worldwide coverage of the infamous "Love Bug" virus focused unwelcome attention on the Philippines. To its credit, the Philippines Congress responded relatively quickly by enacting Republic Act No. 8792, the Electronic Commerce Act, in June 2000. The legislation contains several provisions of importance to the fight against copyright piracy on the Internet.

First, section 33(b) of the Electronic Commerce Act creates a new and broadly worded criminal offense for acts of copyright piracy carried out "through the use of telecommunications networks, such as, but not limited to, the internet." Importantly, the section establishes a minimum penalty for violations that includes both a mandatory six-month jail term and a minimum fine of PP100,000 (US\$2100). The broad coverage of this provision helps to plug some of the gaps left in the copyright provisions of the Intellectual Property Code enacted in 1997. The new law provides a potent legal tool for use against online piracy. The key, of course, will be whether it is aggressively implemented and whether the courts do, in fact, impose deterrent penalties on violators.

The new law also contains a limitation on the liability of certain telecommunications service providers for, among other things, infringement of the exclusive rights of copyright owners and the neighboring rights of producers of sound recordings that are carried out over their systems. In early versions of the legislation, these provisions were quite problematic. For example, key terms were not adequately defined, and the availability of injunctive relief in all cases was not spelled out. However, some of these deficiencies were addressed before the legislation was adopted. As enacted, section 30 of R.A. 8792 explicitly preserves the power of courts to order service providers to cut off access to infringing sites or to preserve evidence of infringement. Nonetheless, the fundamental concern about this legislation remains: in a legal environment in which the exclusive rights of copyright owners are not clearly spelled out, any legislation immunizing service providers from liability for infringement of those rights is at best premature. For example, the Intellectual Property Code does not clearly recognize the exclusive right of sound recording producers to control the posting of their products online and the making available of recordings on demand. While section 33(b) of R.A. 8792 clearly makes a violation of these rights a criminal offense, the basis for civil liability remains murky.

It remains to be seen whether R.A. 8792 provides the legal framework that preserves incentives for the cooperation between service providers and right holders that is clearly needed in order to detect and deal with piracy in the online environment. One positive indicator in this regard is the signing in November 2000 of a memorandum of understanding between the Business Software Alliance and the Philippine Internet Services Organization, in which the parties agreed to establish a "notice and takedown" program to target Internet sites dealing in software piracy. PISO also agreed to move toward a code of conduct on intellectual property to which its member companies could adhere, and has begun similar discussions with other organizations representing copyright owners.

The Philippine legislature missed the opportunity to incorporate within the e-commerce legislation other provisions that would facilitate electronic commerce in materials protected by copyright and neighboring rights. In particular, key enabling technologies for this commerce -- such as electronic rights management systems, and technologies (like encryption or scrambling) that allow copyright owners to control and manage access to and use of protected materials -- need strong legal protection. The Philippines should be urged to enact provisions on these topics promptly, in order to bring its laws more closely into compliance with the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Back in 1997, the Philippines was one of the first countries in the world to amend its law to achieve partial implementation of these critical treaties. In 2001, the Philippines should strive to complete that job and to formally ratify both treaties as well.

## **OTHER LEGISLATIVE REFORM**

The Philippines has other critical unfinished legislative business. Besides the need for comprehensive optical media production regulation, and for a strong law to regulate cable systems and crack down on cable piracy (see discussions above), the Philippines has yet to address the numerous gaps, omissions, and ambiguities that riddle the copyright provisions of the Intellectual Property Code as enacted. Many of these omissions and ambiguities may well have been inadvertent or drafting errors, which properly ought to be corrected in implementing rules and regulations. Unfortunately, both the Bureau of Patents, Trademarks and Technology Transfer (BPTTT), which was charged with preparing the implementing regulations in 1997, and its successor agency, the Intellectual Property Office (IPO) created by the code, have shirked this role. Nearly all the implementing rules and regulations that have been issued apply to purely procedural matters. As a result, none of the highly problematic provisions of the code have benefited from any administrative clarification.

The refusal to address these problems has squandered a valuable opportunity and prevented the Philippines from reaping the full benefit of its long and arduous copyright law reform effort. It has also prevented the Philippines from achieving full compliance with its obligations under the WTO TRIPS Agreement, which became fully applicable to the Philippines on January 1, 2000. The U.S. government should insist that, to the extent possible, the process of issuing implementing rules and regulations should be used to clarify the ambiguities and correct the mistakes that currently block the Philippines from fulfilling its bilateral and multilateral copyright law reform obligations. To the extent that these problems are not amenable to administrative clarification, appropriate amendatory legislation should be quickly enacted.