

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

PHILIPPINES

EXECUTIVE SUMMARY¹

IIPA recommends that the Philippines remain on the Priority Watch List.

The Philippines stands at a crossroads this year in terms of protection of intellectual property, as the dire piracy situation stands in stark contrast to the many positive legislative developments in the country. Rampant pirate production of optical media (CDs and other media read by an optical device such as a laser) decimates markets, and pirate optical media production capacity in the Philippines has exploded, as foreign pirate syndicates flee less hospitable jurisdictions. In addition, the porous borders in the Philippines attract importers and exporters to further inundate already-pirate markets with unauthorized digital copies of software, audiovisual materials, sound recordings and books. The illegal use of software by corporate end users is the most serious threat to the business software industry in the Philippines. The government of the Philippines has heretofore been incapable of defeating such wide-scale problems, whether due to lack of capacity, funding, government will, or a combination of the three.² The country's investigative, prosecutorial, and judicial systems remain under-funded and marred by procedural bottlenecks and endless delays. Results arising out of enforcement actions, even when successful, have had little deterrent effect on the market, leaving piracy losses and levels among the highest in the ASEAN region for certain industry sectors.

On the other hand, some extremely hopeful steps were taken in 2001 toward establishing a friendlier regime toward copyright owners, but these steps must be solidified in 2002 by finalizing and swiftly implementing key legislation.³ Key among the proposals being considered is a comprehensive law to license and control optical media production, including controls on imports of production equipment and raw materials, as well as requirements to use unique source identifiers to track the loci of production. Swift passage and implementation of this law will be crucial to the fight against runaway pirate optical media production in the Philippines.

¹ For more details on Philippine's Special 301 history, see IIPA "History" Appendix to this filing.

² For example, several Philippine government officials have been quoted in 2001 as stating that IPR issues do not rank high on the list of the present administration's priorities. This has included the Secretary of the Committee on Public Information of the House of Representatives, who opined that IPR is just one of many concerns regarding technology.

³ Philippine Senate President Franklin Drilon has made public statements assuring the passage of measures to strengthen the government's capability to curb piracy, stating in early February 2002 that three anti-piracy bills pending in the Senate would be consolidated into a single measure after a series of public hearings by the Senate committee on public information and mass media. Drillon said, "[w]e are committed to assist our entertainment sector in its fight against piracy." *Anti-Piracy Bills*, Business World (Philippines), February 1, 2002, at 6.

In 2002, the government of the Philippines must also:

- Establish better coordination among investigative agencies, with the involvement of the police, prosecutors, customs, and courts, and raiding (without imposing excessive evidentiary thresholds for or delays in issuance of warrants, and without leaks by police to the pirates), investigating, prosecuting (without delays) and seeking deterrent sentences from courts against egregious pirates.
- Work to improve the judicial system, by, for example, reinstating the previous team of specialist IP prosecutors in the Department of Justice dealing with copyright and IPR cases; expediting IPR cases and clearing the backlog (perhaps by dividing caseloads) of IPR cases according to previously issued Court guidelines; imposing higher sentences on offenders as prescribed in the IP Code, particularly for recidivists; and developing and using a cadre of expert judges in the area of copyright.
- Improve Customs enforcement in interdicting importation of piratical product, and working toward a mechanism to monitor and seize pirate exports before they leave the Philippines.

Two legislative (and treaty) developments are also worth noting, which must be completed in 2002:

- The Senate is understood to have given final approval for accession to the most recent WIPO treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) in February. We urge the Secretary of Foreign Affairs to submit the Philippines' instrument of accession with WIPO forthwith, becoming an early member of these important treaties.
- Two pending bills, Senate Bill No. 1704 and House Bill No. 3182, would, if passed, implement requirements of the WCT and WPPT and TRIPS if adopted as drafted, thereby modernizing the legal framework in the Philippines to accommodate e-commerce and to outlaw online piracy.

The Philippines currently benefits from the Generalized System of Preferences (GSP), a U.S. trade program that allows duty-free imports of certain products into the U.S. from developing countries. For the first 11 months of 2001, \$627.2 million of Philippine goods (or 6% of the Philippine's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code.⁴ 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.

Estimated losses to the U.S. copyright industries due to piracy in 2001 in the Philippines were US\$120.1 million, not including losses to the entertainment software industry, which were unavailable at the time of this report.

⁴ In 2000, \$745.4 million of Philippine imports to the United States benefited from the GSP program, accounting for 5.3% of its total imports to the U.S.

PHILIPPINES: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 - 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level										
Motion Pictures	28.0	80%	25.0	70%	18.0	65%	18.0	65%	18.0	65%	22.0	65%
Sound Recordings / Musical Compositions ⁵	23.9	36%	1.4	33%	2.0	20%	3.0	20%	4.0	20%	3.0	20%
Business Software Applications ⁶	24.2	65%	21.8	61%	26.7	70%	25.4	77%	36.0	83%	56.7	92%
Entertainment Software ⁷	NA	99%	41.0	98%	23.8	89%	24.7	90%	21.3	88%	26.0	86%
Books	44.0	NA	44.0	NA	44.0	NA	39.0	NA	50.0	NA	70.0	NA
TOTALS⁸	120.1		133.2		114.5		110.1		129.3		177.7	

COPYRIGHT PIRACY IN THE PHILIPPINES

Optical Media Pirate Production Decimates the Domestic Market and Has Become an Export Problem

There has been a dramatic increase in the production of optical media in the Philippines in 2001. This increasingly serious problem – the production, distribution and sale of unauthorized music CDs, video CDs (VCDs), DVDs, 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.

⁵ Losses to the U.S. recording industry in 2001 in the Philippines are represented by estimated displaced sales, as opposed to pirate sales value (i.e., pirate units multiplied by the pirate unit price), which was the determinant up to 2000. The piracy loss number for 2000 was adjusted upward to \$1.4 million.

⁶ BSA estimates for 2001 are preliminary. In IIPA’s February 2001 Special 301 submission, BSA’s loss and level figures for the Philippines of \$28.2 million and 66%, respectively, were also reported as preliminary. These figures were finalized in mid-2001 as reflected above.

⁷ IDSA piracy loss estimates for 2001 were not available at the time of this report.

⁸ Total losses to the U.S. copyright-based industries of \$120.1 million do not include losses to the entertainment software industry, due to insufficient data received by that industry that did not allow for accurate estimates this year. However, the industry reports that there was no improvement in the situation in the Philippines in 2001 over 2000. In IIPA’s 2001 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in the Philippines were \$139.5 million. Because of the adjustment to reflect BSA’s final 2000 statistics (see footnote 6), and the adjustment to the piracy loss number for U.S. sound recordings (see footnote 5), estimated total losses to the U.S. copyright-based industries in the Philippines in 2000 are adjusted to \$133.2 million.

Currently, an estimated 15 underground plants operate in the Philippines.⁹ Raids conducted by the copyright industries in the past year have continued to reveal evidence of international syndicates' involvement in copyright piracy. The underground pirate production plants are still heavily dependent on Malaysian, Singapore, Hong Kong and Taiwan-based organized crime groups for finance, management, technical assistance and the production of stampers and their mastering activities.¹⁰ Another disturbing feature is the establishment of covert production facilities in remote areas of the country, as well as in the Special Economic Zones situated in the former U.S. military bases outside of Manila.

In addition to increased evidence of pirate production for export,¹¹ there appeared to be large-scale imports of finished domestic and international products into the Philippines from elsewhere in Asia.¹² Manufacturing costs even for underground CD plants in the Philippines are believed to be higher than that of plants in Hong Kong, Taiwan, and China, yet prices of infringing discs in the Philippine market have gone down. This may be explained by Filipino repertoire shipped into the Philippines to cater to local demand. In 2001, for example, recording industry representatives encountered at least one case in Taiwan where a plant raided was found to have been manufacturing pirate Philippines repertoire. A more recent problem is "burned" CD-R piracy; however, the quantity of such discs is still quite low compared to mass pirate optical discs produced in factories or imported into the Philippines from elsewhere in Asia.¹³

The copyright industries now suffer from devastating domestic piracy in the Philippines. For example, the entertainment software industry reports that piracy levels in the Philippines of console-based and PC videogames are a staggeringly high 99%, with pirated CDs, CD-ROMs, VCDs and even DVDs now even available in malls, and through street hawkers and sidewalk vendors. Meanwhile, piracy of motion pictures on optical media, including DVDs, is on the rise in the Philippines. The hardware for playing optical discs is now quite affordable for those living in the Philippines, and in turn encourages the purchase of pirated discs. These pirated discs are of motion pictures not yet released in theaters or on video (so-called "pre-release" titles) and severely

⁹ More optical media lines may easily arrive in the Philippines, exacerbating the problem, in part because of lack of customs regulations dealing with the importation of optical media equipment. In 2001, for example, at least 20 manufacturing lines entered the Philippines without Customs monitoring or notifying right holders concerned.

¹⁰ For example, a plant raided in August 2001 in the industrial zone of Bulacan, Metro Manila was caught replicating unauthorized copies of a U.S. sound recording, with stampers having been supplied to the plant by a Hong Kong-based syndicate. In two separate raids conducted in Metro Manila in February and September 2001 respectively, illegal immigrants from Mainland China were found working in the raided premises. Another plant in Metro Manila, raided in January 2002, was found to have been established by Malaysian owners, who relocated their plant to the Philippines following the coming into force of a law to control the manufacture of optical discs in Malaysia. The second raid against this plant revealed quantities of discs and stampers of Malaysian and international artists. Replication orders and supplies apparently originated from the parent company in Malaysia, and completed orders were then shipped back to the Malaysian market. Philippine authorities arrested several suspects, including six Malaysian national workers.

¹¹ The entertainment software industry reports rampant exports of major companies' product from the Philippines this year, fueling the belief that the plants in the Philippines are linked with internationally-based organized pirates (likely having moved there from Thailand, Malaysia, etc.).

¹² There are reports of pirate CDs being smuggled into the Philippines via the areas of Mindanao City and Ozamiz, Mindano, along with other contraband such as luxury cars and rice, the latter from Vietnam.

¹³ In 2001, only one pirate commercial CD-R "burning" operation was raided, resulting in the seizure of seven machines. There are two more known operators in the Philippines conducting CD-R burning on a commercial scale.

affect the theatrical market in the Philippines.¹⁴ The video market is likewise affected as pirates continually sell relatively old titles in digital formats as well. Infringing “videoke” (“karaoke” sing-along CDs with images) discs containing Filipino and international repertoire now sell for as low as P35 each (US\$0.68), while infringing CDs retail for as low as P20 (US\$0.39) to P35 (US\$0.68) per unit. CDs and VCDs continue to flood shopping malls, markets and sidewalks throughout the country.¹⁵ In one large barter market in the center of Metro Manila, there are approximately 145 stalls selling infringing CDs. The presence of pirate VCDs in the Philippines market continues to grow dramatically, and was the cause for the increase in the level of video piracy from 70% to 80% in 2001. Optical media piracy is the scourge of other copyright industry sectors in the Philippines as well.¹⁶

Other Piracy Phenomena

Forms of piracy other than optical media prevalent in the Philippines include:

- **Cable Piracy.** Cable television piracy remains one of the most serious problems for the U.S. audiovisual industry in the Philippines. Hundreds of cable systems,¹⁷ 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 (as does the related problem of theft of home entertainment satellite signals).¹⁸ Although cable systems outside Manila are supposed to be regulated, there is still a proliferation of infringing transmissions, and it is possible to see new releases repeated several times a day. The National Telecommunication Commission (NTC), responsible for monitoring the operations of licensed and non-licensed cable operators, has shown little willingness to clamp down on cable pirates. As of the end of June 2001, the NTC had monitored the operations of 98 cable operators, and had filed 11 administrative cases. The NTC also submitted an action plan for the new President’s Administration, including the further intensification of regular inspections and extensive monitoring of telecom and broadcast

¹⁴ As an example, motion picture industry representatives recently found pirate VCD copies of the film “Black Hawk Down” as recorded on a camcorder, for 100 pesos (approximately US\$1.95) at the Verra Mall prior to the film’s theatrical release in the Philippines.

¹⁵ These low prices in turn put pressure on record companies to lower the price of legitimate CDs, as there is a popular view that recording companies should compete with prices of pirate product.

¹⁶ For the same P100 (US\$1.95), a Greenhills shopper can also buy a pirate music CD-ROM compilation of business software applications, barely 1% of its legitimate retail price. See Andrade-Jiminez, “Focus – Computer Software, Video CD Piracy,” *Business World* (Philippines), June 22, 2000, at 1. Another press report prices the latest international music full-length CDs at P30 (US\$0.59) to P50 (US\$0.97). Giselle P. Kasilag, “Special Report 2001 Yearend Report – Thriving ‘Piracy’ Industry,” *Business World* (Philippines), Jan. 7, 2002, at 42.

¹⁷ The National Telecommunication Commission (NTC) has reportedly issued approximately 870 “Provincial Authority” permits, and it is estimated that the total universe of cable operators (both licensed and unlicensed) topped 1,000 in 2001.

¹⁸ Another significant form of cable piracy concerns under-declarations of subscriber counts by cable operators. Foreign programmers find that the “certified” annual accounts of subscriber numbers filed by cable operators are inaccurate, in some cases by as much as 50%. Essentially this means cable operators pay only half of the actual program license fees to foreign programmers. The theft of satellite signals of home entertainment channels has also damaged the video retail market.

networks, including cable TV, to determine network compliance with the provisions of the satellite program piracy.

- **Book Piracy.** 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. Commercial reprint piracy also remains rampant. The piracy of scientific, technical, and medical (STM) books also continues to undermine legitimate sales in the Philippines.¹⁹ 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 No. 1203), which allowed Philippines publishers to reprint U.S. publications at will, with token compensation payable (although even that was often not paid) to the right holders. Although these decrees were repealed by enactment of the Intellectual Property Code (which went into effect over four 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 U.S. copyright owners, 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.
- **Videocassette Piracy.** Videocassette piracy continues to be a significant piracy problem in the Philippines. From January to August 2001, some 396 video establishments were newly registered by the Video Regulatory Board (VRB), and some 951 out of 3,950 licenses in the previous year were renewed. There are now 1,347 licensed video establishments and an undetermined number of unregistered and unlicensed video establishments. Almost 100% of the unregistered outlets sell pirated product. Pirated copies are often of very low quality, released within days of the title's U.S. theatrical release, making them attractive in the Philippine market.
- **Internet Piracy.** While still a small problem in the Philippines, mainly due to the poor telecommunications infrastructure existing in the country, Internet piracy is growing. 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 the Electronic Commerce Act in June 2000, which provides some provisions to fight copyright piracy on the Internet, by criminalizing acts of copyright piracy carried out "through the use of telecommunications networks, such as, but not limited to, the Internet" (Section 33(b)).²⁰ That Act also contains one troubling provision limiting liability of certain telecommunications

¹⁹ For example, pirate printers now participate in medical conventions, displaying original books but selling unauthorized bound photocopies. In 2000, a particularly aggressive pirate was arrested twice during the same annual convention of the Philippine College of Physicians for selling her pirate wares.

²⁰ Republic Act No. 8792 (2000).

service providers for, among other things, infringement of the exclusive rights of copyright owners that are carried out over their systems, but the legislation was tightened somewhat before enactment to preserve the ability of courts to enjoin service providers from continuing to allow infringing uses on their networks, and some voluntary arrangements demonstrate promise that workable cooperation may ensue between right holders and telecommunication services in the Philippines (see more detailed discussion of this legislation below).

- **End-User Piracy of Software.** Another enforcement problem that particularly afflicts the business software sector is the unauthorized use of business software in a business setting (so-called corporate “end-user” piracy). 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.

COPYRIGHT ENFORCEMENT IN THE PHILIPPINES

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2000

ACTIONS	BUSINESS APPLICATIONS SOFTWARE
Number of Raids conducted	0
Number of cases commenced	8
Number of defendants convicted (including guilty pleas)	0
Acquittals and Dismissals	0
Number of Cases Pending	8
Total number of cases resulting in jail time	0
Suspended Prison Terms	
Maximum 6 months	
Over 6 months	
Over 1 year	
Total Suspended Prison Terms	0
Prison Terms Served (not suspended)	0
Maximum 6 months	
Over 6 months	
Over 1 year	
Total Prison Terms Served (not suspended)	0
Number of cases resulting in criminal fines	0
Up to \$1,000	
\$1,000 to \$5,000	
Over \$5,000	
Total amount of fines levied	0

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2001

ACTIONS	BUSINESS APPLICATIONS SOFTWARE
Number of Raids conducted	3
Number of cases commenced	1
Number of defendants convicted (including guilty pleas)	0
Acquittals and Dismissals	0
Number of Cases Pending	1
Total number of cases resulting in jail time	0
Suspended Prison Terms	
Maximum 6 months	
Over 6 months	
Over 1 year	
Total Suspended Prison Terms	0
Prison Terms Served (not suspended)	0
Maximum 6 months	
Over 6 months	
Over 1 year	
Total Prison Terms Served (not suspended)	0
Number of cases resulting in criminal fines	0
Up to \$1,000	
\$1,000 to \$5,000	
Over \$5,000	
Total amount of fines levied	0

ADMINISTRATIVE COPYRIGHT ENFORCEMENT STATISTICS FOR 2001

ACTIONS	MOTION PICTURES
Number of raids/searches conducted	1051
Number of administrative cases brought by agency	906
Number of defendants found liable (including admissions/pleas of guilt)	70
Ratio of convictions to the number of raids conducted	70:1051
Ratio of convictions to the number of cases brought	70:906
Number of cases resulting in administrative fines	70
Total amount of fines levied	N/A
US\$0-\$1,000	0
\$1,001-\$5,000	0
\$5,001-\$10,000	0
\$10,000 and above	0
Total amount of restitution ordered in how many cases (e.g. \$XXX in Y cases)	0

Problems in enforcing copyright in the Philippines start at the raid (the beginning of the enforcement process) and end at sentencing, whether administrative or judicial. At every step of the way, right holders experience deep frustrations. Problems include: leaks by enforcement authorities to the suspect that is subject to the raid resulting in loss of evidence (a raid against an optical media plant by the recording industry in November 2001 failed because of a leak); delays in obtaining search warrants; “personal knowledge” requirements (the unreasonable requirement that the enforcement officer seeking the search warrant swear to personal knowledge that a crime is being committed, as opposed to the general international practice of allowing a warrant to issue

based on an affidavit from the informant);²¹ the sale of seized items (pirated goods) by enforcement officials to members of the public; the failure of the authorities to seize clearly infringing or pornographic works, or to seize or dismantle machinery used to replicate infringing optical discs; and the return by the authorities of infringing goods and machinery used to pirate (this occurred in August 2001 upon the raid of an optical media plant, due to the challenge of the search warrant on purely technical grounds, thereby securing release back to the pirates of the replicating machinery and infringing music optical discs and stampers seized). This long list of actual problems experienced in the recent past indicates that 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.

Some Enforcement Raids in 2001

Raid data for 2001 indicates that several enforcement authorities were involved in sporadic raiding, but these efforts collectively failed to deter piracy in the Philippines. For example, the Bureau of Customs (BOC) conducted some seizures in 2001, mainly at the international airport in Manila, but imports and exports of pirate optical media product were at an all-time high. Lack of resources has been another abiding problem, leaving right holders predominantly to be responsible for initiating, executing, supervising, funding and prosecuting their own cases. The main enforcement agencies, the National Bureau of Investigation (NBI), the Video Regulatory Board (VRB) and the Philippine National Police (PNG) have traditionally lacked the requisite funds to conduct operations and store seized equipment and goods. In July 2001, the Office of the President released P1 million (approximately US\$19,500) to fund intelligence and enforcement activities of the VRB, and while this is helpful, it is insufficient to make a serious dent in piracy, particularly when the pirates are so well-funded and resourced.

The VRB took some raids in 2001, seizing 105,000 audio CDs and 100,000 VCDs, and impounding a total of five optical disc replicating lines. Meanwhile, the business software industry, working with the NBI, was able to mount three raids against corporate end user pirated in 2001 (and reached settlements in three other end-user cases). These are not impressive results, and it will require much greater governmental will and fewer problems (like the ones noted above) to achieve any level of deterrence.

Prosecutors Unable to Expedite Cases

Another persistent problem noted by right holders is the failure in the Philippines to provide a specialized cadre of prosecutors who are familiar with and able to handle cases involving copyright piracy. In the past, once a raid was concluded, a special IP Task Force of prosecutors from the Department of Justice would deal with copyright prosecutions; however, this specialist team was dissolved in late 2000,²² due to the limited number of prosecutors available to deal with

²¹ Such unreasonable requirements are often demanded of the business software industry in cases involving criminal end-user piracy, when it should be well understood that in the case of a corporation making numerous unauthorized copies of business software for its internal use, the source with first-hand knowledge is not an officer, but a private informant (often a former employee of the company).

²² Two recent orders, Order No. 197 and Order No. 62, while not abolishing the special IPR Prosecutors, were issued, rather, because in 2000 the Department of Justice (DOJ) prosecutors were overwhelmed with cases, and a decision was made to give some of DOJ's powers to the regional prosecutors. Under these Orders, the filing of complaints was to be

the general case workload. In particular, higher priority was assigned to 'more serious' crimes. Since that time, in 2001, the copyright industries have found that – especially in the more distant provinces – numerous complaints filed with the local prosecutors have languished indefinitely.²³ Despite requests by the copyright industries for reinstatement of the special IP Task Force, reinstatement has not occurred.

Even when a local prosecutor takes copyright cases, procedural requirements almost always doom them. For example, formal complaints investigated by a prosecutor take months to complete, and decisions to prosecute are subject to appeal to the office of the Secretary of Justice. In January 2001, the business software industry received a final decision from the Department of Justice, refusing to prosecute a retailer who was caught with 2,800 units of unlicensed software, in a raid that took place in November 1995 – 62 months prior to the decision. In two other cases, two separate underground CD plants raided in October 1999 and February 2001 were found to be replicating infringing sound recordings. In each case, the accused raised a plea of "noninvolvement," and despite clear evidence to the contrary (business documentation submitted by the complainants to prove the two suspects' ownership and management of the underground CD replicating facility), the prosecutors in both cases determined in 2001 that the arguments of the accused parties could be upheld.²⁴

Need for a Coordinated Response

What is needed in the Philippines is effective enforcement of the existing laws (and hopefully forthcoming new laws) through adequately motivated law enforcement and investigative agencies, efficient and responsive prosecutors, and expeditious court proceedings that culminate in the imposition of deterrent penalties. The increasing sophistication of the entities involved in piracy, and the role of organized crime elements, mean that the various enforcement agencies urgently need to step up their skills when enforcing copyright. 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.

Other problems plague enforcement, as numerous enforcement agencies share responsibilities in fields such as videocassette and cable piracy, and interagency turf battles and a

done at the regional rather than the national level. However, by the middle of 2001, objections by right holders resulted in DOJ once again agreeing to accept the filing of complaints. As of February 2002, DOJ prosecutors will make a preliminary investigation of a complaint, and generally pass the matter to regional prosecutors unless the case is a matter of "national interest" (both VCD and computer software piracy are considered *prima facie* matters of "national interest"). It should also be noted that, as a practical matter, since IPR crimes involve a private complainant, "special arrangements" can operate where a private prosecutor can handle the case in court "under the direct supervision of the public prosecutor," in which case the public prosecutor will no longer need to be personally involved in the case.

²³ The IP Task Force handled 679 complaints in 2000, dealing with 514 as follows: 128 were dismissed as without legal foundation after preliminary investigation; 218 were referred directly to a court for prosecution; 166 were referred to the relevant prosecution office for further investigation; and two complaints were withdrawn. Through June 2001, the IP Task Force had dealt with 190 new complaints, as well as most of those carried over from 2000.

²⁴ Efforts to appeal the prosecutor's decisions in these two cases have been unsuccessful.

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. It is necessary to establish better coordination among investigative agencies, with the involvement of the police, prosecutors, customs, and courts, and raiding (without imposing excessive evidentiary thresholds for or delays in issuance of warrants, and without leaks by police to the pirates), investigating, prosecuting (without delays) and seeking deterrent sentences from courts against egregious pirates.

The Specialized IPR Courts Have Not Effectively Combated Piracy

The Philippine justice system is ineffective in dealing with piracy. While the Supreme Court has designated Special Intellectual Property Rights (IPR) Courts to hear intellectual property rights cases, and its operating guidelines allow for expeditious decisions, these courts have not had their intended effect.²⁵ In at least two cases in the past year, judges have quashed search warrants they had previously issued, after motions brought by defendants. In those cases, the defendants' applications were heard unilaterally (i.e., the copyright owner was not present). These decisions, made post-raid, to grant the defendants' motions in these cases, despite the fact that the judges in question had issued the search warrants after making due inquiry, cast doubt on the system at the first instance. Even if a piracy case manages to survive the obstacle course of raid, investigation and prosecutorial decision-making, 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.²⁶ Not surprisingly, many defendants simply disappear at some point during the long odyssey of their cases.

While 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 e-commerce legislation discussed below, in practice, deterrent sentencing remains a mirage. For example, the business software industry reports that there has not been a single criminal conviction for business software piracy in the 50 months since the code took effect. Similarly, there were no known convictions under the code in music piracy cases in 2001. Presently, the business software industry has seven active criminal cases in court (four cases still in the litigation stage and three cases on appeal), with the earliest case dating back to 1995.²⁷

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

²⁵ In 1996, the Philippine Supreme Court designated 48 courts nationwide as Special Intellectual Property Rights Courts, and in September 2000, the Philippine Supreme Court expanded the designation to include 24 municipal courts, half in Metro Manila. The copyright industries welcome these steps, 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, however, these attempts at judicial reform have been a failure. Judges are frequently rotated, retire, are promoted or transferred, further weakening the effectiveness of these courts, and lessening any benefit gained out of training.

²⁶ In one case initiated by the business software industry in 1995, the defense challenged the search warrant, and the matter eventually wound its way to the Court of Appeal, which ruled on the matter in the industry's favor in December 2001. The case took almost seven years to determine this search warrant issue.

²⁷ There are five other cases in which the business software industry is still waiting for court notices and there are nine other cases in which the accused fled, meaning the cases have been archived pending the defendants' arrests.

cases, and that consistently hand down the increased deterrent sentences authorized by Philippine law, but this goal seems no closer to attainment. While some of its ASEAN neighbors, like Thailand, have made great strides in improving the performance of their courts in piracy cases, the courts in the Philippines remain 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 the courts 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.

MARKET ACCESS ISSUES

Restrictions on Foreign Ownership of Mass Media

One abiding problem in the Philippines, especially for U.S. interests, is that foreign investment in mass media is strictly prohibited under the Philippines Constitution. The pay television sector, for example, which is classified under mass media, is burdened by such foreign investment restrictions, ultimately impeding further development of the cable television market in the Philippines. Draft cable legislation is reportedly being considered that contains a provision allowing up to 40% foreign investment in cable systems that do not produce their own programs or content.²⁸ As the broadcast industry moves towards a converging environment, operators are encouraged to provide both infrastructure and content; it is essential in this environment that foreign equity restrictions such as the one found in the Philippines be removed.

COPYRIGHT LAW AND RELATED ISSUES

The year 2001 saw a flurry of positive legislative activity in the Philippines, in the form of numerous bills relating to copyright and optical disc manufacturing that were introduced in both houses of the Philippine Congress.²⁹ IIPA sincerely hopes that 2002 will be the year that these many initiatives proceed to passage by the Congress, and more important, that they are then implemented, bringing positive gains to copyright owners through increased enforcement of their rights.

Philippines Considering Strong Optical Media Legislation

IIPA is very pleased that the government of the Philippines is considering enactment of strong regulations to control pirate optical media production in the Philippines. IIPA understands that as of early February 2002, there are two separate bills pending in the House of Representatives.

²⁸ Other important provisions in the draft cable law include some loosening of advertising restrictions and stiffer penalties for cable piracy.

²⁹ Nonetheless, there remain some points of frustration. For example, the recording industry has lobbied high-level Customs officials to draft long-awaited implementing rules and regulations as mandated in section 190 of the Intellectual Property Code, to no avail. A drafting team has been set up to carry out the work but is understood to still be awaiting a directive from the Secretary of Finance.

IIPA strongly supports a “stand-alone” approach,³⁰ which will, if strongly implemented, effectively control pirate optical media production through: coverage of the importation of equipment and raw materials for the mastering and replication of all optical media products; licensing of all production sites; the possibility of spot inspections of their facilities and records, including production orders; and the requirement of the use of the manufacturer’s codes or similar unique markings on all masters and copies of optical media products manufactured in the country.³¹ IIPA understands that the House has decided to convene a Technical Working Committee to reconcile the two draft bills, and aims to finalize its recommendations by the end of February 2002. If the remaining questions can be promptly resolved, and if the legislative process 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.

Philippines Poised to Pass Copyright Law Amendments to Strengthen Enforcement and Protect Copyright in the Digital Environment

Identical bills to amend the Intellectual Property Code are under consideration in the Senate (S.B. 1704) and in the House (H.B. 3182). The Senate bill was introduced on September 6, 2001 by Senator Ople, and the House bill was introduced shortly thereafter. The bills, if enacted in their current form, would make the Intellectual Property Code in the Philippines one of the strongest copyright laws in the world, in full compliance with TRIPS and entirely compatible with the requirements of the WIPO treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). IIPA commends the government of the Philippines for having the foresight to move on this legislation, and hopes for swift movement in the Senate toward final

³⁰ Bill No. HB1077 is entitled “An Act To Curtail Entertainment Media Piracy In The Philippines, For This Purpose, Reorganizing the Videogram Regulatory Board Into The Entertainment Media Regulatory and Anti-Piracy Board, And For Other Purposes,” and was introduced by Congresswoman Imee Marcos (commonly known as the EMRAP Bill). Bill No. HB3825 is entitled “An Act To Curtail Optical Media Piracy, Providing Penalties For Violations, Appropriating Funds Therefor, And For Other Purposes,” and was introduced by Imee Marcos and Harry Angping (commonly known as the stand-alone Bill).

³¹ The key elements of an effective optical media law include:

- 1) centralized licensing (for a fixed, renewable term) of all optical media mastering or manufacturing facilities, as well as those persons or legal entities that engage in “multiple recording” of content onto “recordable” media (i.e., including those that burn multiple CD-Rs simultaneously by banking consumer machines together);
- 2) centralized licensing of importation, exportation, and internal transfer of optical disc mastering or manufacturing equipment and machinery;
- 3) centralized licensing of importation of optical grade polycarbonate or any other material capable of being used as the raw material for the manufacture of optical discs;
- 4) requirement to use a secure unique identifier [i.e., the placement of a licensed secure unique identifier such as source identification code, including mastering code numbers and a separate and unique mould code number for each mould used, on all masters (stamper) and finished products produced within the country to identify the source of manufacture];
- 5) licensee record-keeping requirements, including customer orders, and quantity of raw materials received at the premises;
- 6) inspections, searches and seizures by an enforcement agency at any time to ensure compliance with all reporting and license requirements;
- 7) government record-keeping requirements, including the establishment and maintenance of a register of the licenses granted, which shall be available for public inspection, and inspection action;
- 8) criminal penalties, including individual liability, for violation of any significant aspect of the regime, including the possibility of immediate shutdown of unlicensed facilities or violators.

adoption. IIPA understands that on January 29, the House Committee on Trade and Industry, chaired by Congressman Harry Angping, held a hearing on the bill, and that some minor changes may be contemplated. The comments herein are directed at the bill as it appeared prior to that hearing.³²

The Bills in the House and Senate, if passed, would, among other things, do the following:

- Section 1 of the bill provides a strong, WIPO treaties-compatible “communication to the public” right (see WCT Article 8), and Section 18 provides a somewhat analogous treaties-compatible right as to sound recordings (WPPT Article 14).
- Sections 2 and 17 of the bill confirm the protection in the Philippines of “temporary copies” as part of the reproduction right in works and sound recordings (see Agreed Statement Concerning WCT Article 1(4), Agreed Statement Concerning WPPT articles 7, 11, and 16). IIPA understands that one of the topics that came up at the hearing was the protection of temporary copies. “Temporary” copies of works or other protected material made in the RAM of a computer (or through other similar technologies) should be recognized as reproductions in the Philippines. The duration of time that a “copy” of a work or other protected subject matter exists should not be a factor in whether there is a reproduction, but rather whether that duration, however long, permits the work to be exploited in the same manner as if it were a permanent copy.³³
- Sections 3 and 33 of the bill provide for necessary protections against circumventing, and trafficking in devices that circumvent, technological protection measures (WCT Article 11, WPPT Article 18), and against unlawful tampering with rights management information (WCT Article 12, WPPT Article 19).
- Section 4 of the bill provides an exclusive importation right, extremely important in the Philippines to ensure that it provides adequate and effective protection against pirated imports, including of optical media.
- Section 5 of the bill appropriately clarifies ownership of rights in an audiovisual work.
- Section 10 of the bill appropriately narrows an exception to protection regarding computer programs, so that the law is TRIPS-compatible (TRIPS Article 9.1).

³² At the January 29 hearing of the House Committee on Trade and Industry (chaired by Congressman Harry Angping), discussion was mainly focused on the optical disc regulation. Discussion of H.B. 3182 was limited to the Intellectual Property Office raising some questions about temporary copy protection and the need to include *ex parte* search and seizure remedies in light of recent changes to the Supreme Court’s Rules of Court. A “technical working group” will be established for further discussion on the House bill.

³³ Note that this is the spirit of the Agreed Statement concerning Article 1(4) of the WCT, which states in part, “[t]he reproduction right, as set out in Article 9 of the Berne Convention . . . fully appl[ies] in the digital environment, in particular to the use of works in digital form . . .” (while the Agreed Statement concerning Articles 7, 11 and 16 of the WPPT states in part, “[t]he reproduction right, as set out in Articles 7 and 11 . . . fully appl[ies] in the digital environment, in particular to the use of performances and phonograms in digital form . . .”). As WIPO has explained, this agreed statement states the obvious: the concept of reproduction, under Article 9(1) of the Berne Convention, extends to reproduction “in any manner or form”; therefore, a reproduction should not be excluded from the concept of reproduction just because it is in digital form, through storage in electronic memory, nor should it be excluded from the concept of reproduction just because it is of a temporary nature.

- Section 13 of the bill empowers Customs to deal with pirated exports, important in the Philippines to ensure that it provides adequate and effective protection against pirated exports of optical media.
- Sections 20-22 of the bill provide for extension of duration of protection for works, performances, and sound recordings.
- Section 23 of the bill provides for protection against contributory and vicarious infringements.
- Sections 25 and 26 of the bill provide for, on their face, adequate civil damages, including (in Section 26) for the possibility of pre-established damages (TRIPS Article 45).
- Section 27 of the bill provides for TRIPS-compatible provisional measures (TRIPS Articles 46 and 50). We understand that the January 29 House hearing included discussion of the language expressly providing for *ex parte* remedies in the bill, in light of the Supreme Court "Rules on Search and Seizure in Civil Actions." However, since the Supreme Court Rules are only advisory as to the judiciary, and are subject to change, Section 27 should retain the explicit language in the Intellectual Property Code to provide the greatest clarity that the law in the Philippines complies with TRIPS on this matter.
- Section 30 of the bill provides for disclosure of certain information to right holders to assist them in carrying out enforcement of their rights, and for acceptance by enforcement authorities of a "proportional examination" of articles seized (i.e., "sampling").
- Section 31 of the bill provides for TRIPS-compatible retroactive protection of works, sound recordings and performances fixed in sound recordings, as also required by the WIPO treaties (WCT Article 13, WPPT Article 22).
- Section 32 allows for recovery of damages for cases commenced within four years of the time the cause of action arose.

Philippines Poised to Join the WCT and WPPT

A related positive development in the Philippines involves movement toward accession to the WCT and the WPPT. In October 2001, President Arroyo signed off on the accession, and on January 21, 2002 the Senate Committee on Foreign Relations held its first and final hearing on the WIPO treaties ratification, at which time there was unanimous consensus to accede to the treaties. The Committee reportedly prepared a report at the end of January for submission to the full Senate. The second and final Senate reading is expected to take place in February 2002. IIPA understands that once the Senate gives final approval, the resolution will be sent to President Arroyo's office for implementation by the Secretary of Foreign Affairs, and that then, it will be the responsibility of the Secretary of Foreign Affairs to deposit the instrument of accession with WIPO. The WCT will go into force on March 6, 2002, while the WPPT requires only two more deposits as of the date of this filing, deposits which are sure to come shortly.

Supreme Court “Rules on Search and Seizure in Civil Actions” Appear to Provide for TRIPS-Compatible *Ex Parte* Civil Searches

IIPA was pleased to learn that, on January 22, 2002, the Supreme Court issued “Rules on Search and Seizure in Civil Actions for Infringement of Intellectual Property Rights.” The new rules give courts authority to issue *ex parte* civil search orders, thereby addressing a long-standing deficiency in the legal system in the Philippines. Senate Bill No. 1704 and House Bill No. 3182 (discussed above), currently pending before both bodies, propose to amend the current Intellectual Property Code to expressly provide such a remedy as well. The Rules as well as the explicit clarification in the Intellectual Property Code hopefully will ensure that enforcement against institutional end-user piracy can be carried out more effectively (through, for example, unannounced searches of an institution’s computers for evidence of illegal copies). The Rules and the explicit fix in the Code will hopefully ensure that the Philippines meets its TRIPS Articles 41 and 50 obligations on this point.

Nonetheless, there are some fundamental issues that either were not addressed in the Rules, or for which the Rules as promulgated leave questions. For example:

- Courts should be allowed to receive “unattributable evidence” (Section 4), so that informants will be able to come forward without fear of retaliation.³⁴
- The requirement of a “strong” *prima facie* case may leave the threshold for obtaining provisional measures unreasonably high (Section 6(b)).³⁵
- Searches and seizures should be permitted (to be carried out) whenever they will be most effective, including at any time, day or night (Section 10).
- Safeguarding defendants’ legal rights should not require the appointment of an extra commissioner and the involvement of the sheriff (sections 11 to 19).³⁶

³⁴ Evidence to support an *ex parte* civil search order is obtained primarily from witnesses who come forward with information about suspected copyright infringements. These witnesses are often employees or former employees of suspected violators – the only individuals with reliable knowledge of the organization’s working practices. They are, however, often afraid to come forward, fearing retaliation by defendants as well as loss of future employment prospects, social standing and professional reputation. Therefore, witnesses should not be required to be named or to give direct evidence of infringement in order for a search order to issue. Hearsay evidence, provided for example by qualified lawyers or hotline operators, should be sufficient. Section 4 of the present Rules should be amended accordingly, and along the lines of the Irish Copyright Act, section 132(3), courts should be empowered to receive hearsay evidence.

³⁵ The applicant should not need to provide complete evidence in support of his claims when applying for a provisional measure; rather, but rather, sufficient evidence in support of the applicant’s claims. The Rules should be interpreted accordingly.

³⁶ Anton Piller Orders are too expensive and too cumbersome. One of the major causes for this is the obligatory involvement of very expensive “independent” court-appointed supervisors. We note that in the Rules, the commissioner and the sheriff have been entrusted with duties and responsibilities similar to law enforcement officers in the execution of a criminal search and seizure order. While IIPA understands the need for orderly execution of the writ, we submit that the Rules of Court contain sufficient safeguards for the defendant from abuse by the applicant; therefore the requirement for the Commissioner and the sheriff should be dispensed with. Alternatively, the function of the Commissioner can be fulfilled by an applicant’s attorneys, acting in his/her capacity as an officer of the court. We recommend that references to the Commissioner and the sheriff be deleted and substituted with applicant’s attorney.

- Seized articles that cannot manually be “delivered up” should be “sealed” or otherwise rendered unusable (Section 14, paragraph 2).
- The *ex parte* civil search order should be revoked, upon application, only if the right owner fails to bring legal actions or the writ is improperly issued (Section 18).³⁷
- Right owners should not be held liable for improper actions by the authorities (sections 9 and 21).³⁸

Continuing Concerns Over the Electronic Commerce Act

As noted, the infamous “Love Bug” virus led to the passage of 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 P100,000 (approximately US\$1,950). 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.

Of great concern to right holders is the provision in the Act limiting 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 the Act 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 the Electronic Commerce Act clearly makes a violation of these rights a criminal offense, the basis for civil liability remains murky. It

³⁷ The present provision would allow for the revocation of the order if the bond issued turned out to be of insufficient amount or if the suspected goods are found to be not infringing. The reason a bond would be insufficient is that the extent of infringement is greater than anticipated at the time of the placing the security, thus this should not be grounds for revoking a civil search order. Further, it is not to be determined at the time of the search whether the goods are infringing, thus, it is inappropriate for an order to be discharged on these grounds.

³⁸ Right owners or their representatives should naturally not be held liable for improper or illegal actions over which they have no control. Right owners’ obligations to indemnify and pay damages should be limited to injury resulting from right holder wrongful actions.

remains to be seen whether the Electronic Commerce Act 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. Other industries have been successful in cooperating with ISPs in addressing piracy on digital networks, albeit in a limited way.³⁹

³⁹ The recording industry, for example, sent two cease-and-desist letters to Philippine ISPs with respect to infringing MP3 files. A positive response was received for one letter.