

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2003 SPECIAL 301 REPORT

PHILIPPINES

EXECUTIVE SUMMARY¹

The Philippines should remain on the Priority Watch List. Despite enhanced enforcement during the last two quarters of the year, there has been little improvement in the piracy situation over the last year, while the optical disc draft legislation and the draft copyright law amendments remained stalled in Congress.

The Philippines was a perennial on the Watch List until 2001, when, due in large part to the worsening optical disc piracy problem, the Philippines was elevated to the Priority Watch List. In 2002, the Philippines remained on the Priority Watch List with an out-of-cycle review to evaluate progress on passage and implementation of an effective optical disc law.

Optical disc (CD, VCD, DVD, CD-ROM) piracy of copyright material (music, audio-visual, business software, videogames) decimates both the domestic market and markets outside the Philippines, and pirate optical disc production capacity in the Philippines has exploded as foreign pirate syndicates flee less hospitable jurisdictions. An effective optical disc law has not yet been passed nor effectively implemented. Piracy of business software (by corporate end users) and books (reprints and unauthorized photocopying) must be curtailed. The government of the Philippines should be commended for joining the WIPO "Internet" treaties and must now fully implement those treaties. The prosecutorial and court systems remain marred by delays and procedural hurdles.

Required Action for 2003:

Enforcement

- Maintain sustained enforcement raids, including, once optical disc regulations have passed, raids against unlicensed plants and against licensed plants with regard to license compliance, seizures and destruction/dismantling of and impounding illegal goods and equipment.
- Run coordinated sustained raiding, including against pirate book reprint facilities and photocopy shops, with follow-up monitoring of progress to prosecution.
- Clear backlogs of investigations and court cases; reinstate specialized IP prosecutors in the Department of Justice; and ensure that only expert judges handle copyright cases.

Legislation

- Pass an effective optical disc law to enable licensing and control over optical disc 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.
- Pass draft copyright law amendments to fully implement the WIPO "Internet" treaties, and avoid delay that may occur if copyright amendments are lumped into an omnibus IP bill.

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

PHILIPPINES
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1998 - 2002²

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	30.0	80%	28.0	80%	25.0	70%	18.0	65%	18.0	65%
Records & Music ³	20.9	40%	23.9	36%	1.4	33%	2.0	20%	3.0	20%
Business Software Applications ⁴	20.1	61%	19.9	63%	21.8	61%	26.7	70%	25.4	77%
Entertainment Software	NA	NA	NA	99%	41.0	98%	23.8	89%	24.7	90%
Books	45.0	NA	44.0	NA	44.0	NA	44.0	NA	39.0	NA
TOTALS	116.0		115.8⁵		133.2		114.5		110.1	

COPYRIGHT PIRACY IN THE PHILIPPINES

Optical Disc Pirate Production for Export Remains a Deep Concern

Pirate optical disc (CD, VCD, DVD, CD-ROM) production capacity in the Philippines has exploded, as foreign pirate syndicates flee less hospitable jurisdictions. Underground pirate production plants are heavily dependent on Malaysian, Hong Kong and Taiwan-based organized crime groups for finance, management, technical assistance and the production of masters used to pirate CDs.⁶ Porous borders in the Philippines continue to attract importers and exporters, further inundating already-pirate markets with unauthorized copyright materials.

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website (www.iipa.com/pdf/2003spec301methodology.pdf).

³ 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.

⁴ BSA 2002 loss estimates are preliminary. In IIPA's February 2002 Special 301 submission, BSA's loss and level figures for the Philippines of \$24.2 million and 65%, respectively, were also reported as preliminary. These figures were finalized in mid-2002 and are reflected above.

⁵ In IIPA's 2002 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in the Philippines were \$120.1 million. Because of the adjustment to reflect BSA's final loss statistics for the year 2001 (see footnote 4), estimated total losses to the U.S. copyright-based industries in the Philippines in 2000 are adjusted to \$115.8 million.

⁶ 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 the Optical Disc Act in Malaysia. Replication orders and supplies

Currently, IIPA can verify the existence of nine optical disc plants having 23 production lines operating in the Philippines, with an estimated overall production capacity of 80.5 million discs per year, many multiples of any rational legitimate domestic demand for discs in the Philippines.⁷ The result is massive exports of pirate copies of major U.S. companies' product. 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. A more recent problem is "burned" CD-R piracy; however, the quantity of such discs is still low compared to mass pirate optical discs produced in factories or imported into the Philippines from elsewhere in Asia.⁸ Nonetheless, pirate "burned" CD-Rs, which used to exist in small retail establishments, now is becoming a greater commercial concern for the copyright industries.

Piracy in the Domestic Market Remains Common, Destroying Some Industry Sectors' Entire Legitimate Market in the Philippines

Notwithstanding the insistence of some Philippine officials, including Congressional representatives, that the government is doing everything it can against piracy, pirate product and other piracy phenomenon (such as cable piracy, end-user piracy of software, which involves the illegal loading of business software onto a computer, etc.) remain ubiquitous. IIPA remains most concerned about the following problems:

- **Optical Disc Piracy Wipes Out the Legitimate Domestic Market.** The distribution and sale of unauthorized music CDs, video CDs (VCDs), movies on DVDs (on the rise), and CD-ROMs containing illegal copies of copyrighted materials (business software applications, entertainment software, movies, music, and reference materials) damage the potential legitimate domestic market for copyright owners. The sources of pirate optical discs include those produced in-country, large-scale imports of finished domestic and international products into the Philippines from elsewhere in Asia,⁹ and "burned" CD-Rs.¹⁰ Such materials include the latest run feature films not even released in the theaters, like *Lord of the Rings*:

apparently originated from the parent company in Malaysia, and completed orders were then shipped back to Malaysia. Philippine authorities arrested several suspects, including six Malaysian national workers.

⁷ More optical media lines may easily arrive in the Philippines, exacerbating the problem, in part because of lack of regulations dealing with the importation of optical media equipment. In 2001, for example, IIPA understands that at least 20 manufacturing lines entered the Philippines without Philippine Customs monitoring or notifying right holders concerned. The Bureau of Customs was apparently aware of only two illegal shipments of CD lines – one line which entered the Clark Economic Zone in 1998 which was released after the importer paid the taxes, and a 4-line shipment in November 2002 which the Bureau seized. Part of the reason for difficulty in detection is that pirates engage in 'technical smuggling' – mis-declaring the machines as "plastic extrusion machines" – or outright smuggling.

⁸ 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.

⁹ There are reports of pirate CDs/VCDs/DVDs being smuggled into the Philippines via the areas of Mindanao City and Ozamiz, Mindano, along with other contraband such as drugs, luxury cars, vegetables, and Vietnamese rice. Organized criminal syndicates make their money on the drugs, hence, they can afford to sell rice, vegetables, and pirate goods for almost no profit. In December 2002, a shipload of smuggled rice was intercepted by the Philippine Coast Guard. Pirate CDs of Filipino music repertoire made in Taiwan were seized. Many of the imported pirate CDs are suspected to be coming from Sabah, Malaysia.

¹⁰ Pirate CD-Rs are now surfacing in greater quantities in the Philippines, and CD-R machines are now proliferating. In January 2003 alone, 165 CD-R "burners" were seized. A group of pirate operators are suspected to be operating several multiple-disc CD-R burners in different locations.

The Two Towers.¹¹ The market for movies is also hurt due to affordability of hardware for playing optical discs of motion pictures, creating a market for pirated discs of “pre-release” movies as well as previously released titles, which are now readily available.¹² The emergence of pirate DVDs into the Philippines marketplace in the last half of 2002 is also of significant concern, as it is widely believed that pirated DVDs are now being manufactured in-country. The price of pirated DVDs has noticeably been reduced and a new title now sells as low as P80 (US\$1.48) each. The entertainment software industry reports that piracy levels in the Philippines of console-based and PC videogames remain close to 99%. Pirate copies of entertainment software are available for as little as P35 each (US\$0.65). Pirate entertainment software can also be readily found at malls (where they are sold through some computer software shops) and flea-markets. Business software piracy also remains high in the Philippines, at 61% illegal in 2002. Infringing “videoke” (“karaoke” sing-a-long CDs with images) discs containing Filipino and international repertoire now sell for as low as P35 each (US\$0.65), while infringing audio CDs retail for as low as P20 (US\$0.37) to P35 (US\$0.65) per unit.

- **Cable Piracy Saps Cable Television Revenues.** Cable television piracy has emerged as the most serious problem for the U.S. audiovisual industry in the Philippines after optical disc piracy. Hundreds of cable systems,¹³ especially those outside Manila, make unauthorized transmissions of new and recent Hollywood productions their standard fare, damaging the legitimate theatrical and home video markets.¹⁴ Although cable systems outside Manila are 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) is responsible for monitoring the operations of licensed and non-licensed cable operators. However, NTC officials insist they have no jurisdiction over copyright violations, and that the responsibility for enforcement lies with the Intellectual Property Office (IPO), and neither agency has been particularly effective in addressing cable piracy. It should be noted, however, that towards the end of 2002, the current NTC Commissioner did issue “cease and desist” letters to pirate cable operators. It is unclear, however, if the effort is continuing or has had any significant effect. Most local

¹¹ See “US Calls on Philippines to Enforce Intellectual Property Rights,” Agence France Presse, Jan. 10, 2003. While the number of stalls changes from month to month, sources indicate that there are as many as 150 to 225 stalls in the Philippine market. Press reports in early 2003 indicate that raids are being carried out of street vendors, including confiscation of product, but that the vendors are “back in the business the following day with a vengeance.” However, rather than finding stalls openly selling pirated product, after the raiding, one encounters “someone holding a printed list of CD titles whispering ‘Sir CD?’ as you pass by.” Dave L. Llorito, “Intellectual Piracy a P9-billion Headache for Law Enforcers,” Manila Times, Jan. 3, 2003 (at <http://www.manilatimes.net/others/special/2003/jan/03/20030103spe1.html>).

¹² It is by and large the presence of pirate VCDs in the Philippines market that was the cause for the increase in the level of video piracy from 70% to 80% in 2001; video piracy levels remained a staggeringly high 80% in 2002.

¹³ 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.

¹⁴ 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.

industry representatives recommend that the NTC's charter be amended to include enforcement authority against intellectual property rights violations within its purview.¹⁵

- **End-User Software Piracy Remains the Most Serious Threat to the Business Software Industry in the Philippines.** Unauthorized loading and use of business software by corporations (for example, where one copy of software is purchased but then illegally loaded on many computers) remains a problem in the Philippines. IIPA and the Business Software Alliance appreciate the Philippine government's endorsements of BSA's public relations and educational campaigns to address the growing problem.¹⁶ It is important that such efforts be backed by effective enforcement actions by the government in 2003.
- **Textbook Piracy, Pirate Photocopies and Illegal Reprints of Published Materials Continue Hurting U.S. Publishers.** The growing underground industry of illegally reproducing and distributing pirate textbooks in the Philippines has gotten out of control, and has made the Philippines one of the largest book piracy havens in Asia. Hundreds of copyshops, located in the University Belt (near Recto, Morayta and Dapitan Streets) readily accept orders for entire textbooks on a routine basis, and 'print-to-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, and attitudes among some university officials, and even professors (many of whom are authors themselves!) are truly appalling.¹⁷ In addition, illegal reprints of books (made to look as much like the original as possible) are being churned out by pirates. In most instances, the government knows who the pirates are; they just fail to take the necessary action to put them out of business.¹⁸ The Philippine government has also indicated that it is willing to crack down on any books still being printed under a repealed compulsory reprint license decrees (Presidential Decree No. 1203, which had allowed reprints of certain pre-1997 works without authorization under certain circumstances), but no deadline was ever put into

¹⁵ A cable regulatory bill has been under consideration for over five years, but lacks consensus by relevant industry groups to get it enacted. Meanwhile, NTC had an action plan as a stop-gap measure, including increased oversight of telecom and broadcast networks, including CATV, on a nationwide basis, through an intensification of regular inspections and monitoring, to determine network compliance with provisions on satellite program piracy. NTC's activities have proved to be ineffective due to budgetary constraints and lack of personnel.

¹⁶ The Business Software Alliance's anti-piracy campaign, labeled "Go ICT, Stop Software Piracy Campaign," launched on March 15, 2002 received endorsements from 15 government and private sector agencies. The government also supported the BSA "Assistance in Software Auditing Program 2" (ASAP 2), which was a follow up to the first ASAP campaign launched in June 2001. More recently, BSA conducted a number of Software Asset Management (SAM) seminars in Manila, Subic, and Cebu. Philippine government attendance at such seminars indicates is that key decision makers recognize the problem of end-user piracy; nevertheless, the problem of end-user piracy has not been defeated, so it is vital for the government of the Philippines to redouble its efforts to address this damaging form of piracy in 2003.

¹⁷ IIPA is aware of one instance several years ago in which a student was ridiculed by his law school professor for asking that the school ensure that a reference book authored by the student's father be purchased legally instead of pirated. Such instances are apparently not uncommon in the Philippines, and evidence the need for greater awareness of the need to respect copyright.

¹⁸ For example, there continues to be rampant piracy of scientific, medical and technical (STM) books. Named pirates include MultiLinks, Alphamedocs and Busybooks, all of whom are well known to the government. In one case in 2000, an AAP member conducted a raid on a medical book pirate, but the pirate was back in business the next day. This open-and-shut piracy case has been in the litigation stage for several years. The owner of the MultiLinks store remains in business earning enormous profits while her case has dragged through the court system for nearly 3 years. Another phenomenon involved the pirates participating in medical conventions, displaying legal editions and selling pirate photocopies under the table. Arrests of such pirates in the past, e.g., in 2000 at the Philippines College of Physicians annual convention, have led to no convictions.

place by which time reprints under the old law had to be sold (and proof of the printing date is next to impossible). All compulsory reprint license lists should be immediately rescinded, the ongoing validity of any such license formally terminated, and existing stocks of reprinted books brought under the control of the legitimate publishers.

- **Video Piracy Adds Further Injury to the Hobbled Audiovisual Sector.** Videocassette retail piracy remains a significant problem in the Philippines. From January to August 2002, 239 video establishments were newly registered by the Video Regulatory Board (VRB), and 625 out of 2,916 licenses from the previous year were renewed, resulting in a total of 1,677 licensed video establishments and an undetermined number of unregistered and unlicensed video establishments. Virtually all unregistered outlets sell pirated product. In addition, recent enforcement activity indicates that large-scale pirate video duplication (often very low quality) and distribution operations are conducted in major population centers. These copies are released within days of the title's U.S. theatrical release at low prices, making them attractive in the Philippine market.

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

PHILIPPINES CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2002

ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	SOUND RECORDINGS ¹⁹
Number of raids conducted	259	3	35/3
Number of cases commenced	3	3	147/2
Number of defendants convicted (including guilty pleas)	0		
Acquittals and dismissals	0		
Number of cases Pending	3	8	
Total number of cases resulting in jail time	0		
Suspended prison terms	0		
Maximum 6 months	0		
Over 6 months	0		
Over 1 year	0		
Total suspended prison terms	0		
Prison terms served (not suspended)	0		
Maximum 6 months	0		
Over 6 months	0		
Over 1 year	0		
Total prison terms served (not suspended)	0		
Number of cases resulting in criminal fines	0		
Up to \$1,000	0		
\$1,000 to \$5,000	0		
Over \$5,000	0		
Total amount of fines levied (in US\$)	0		

PHILIPPINES ADMINISTRATIVE COPYRIGHT ENFORCEMENT STATISTICS FOR 2002

ACTIONS	MOTION PICTURES
Number of raids/searches conducted	1,534
Number of administrative cases brought by agency	480
Number of defendants found liable (including admissions/pleas of guilt)	480
Ratio of convictions to the number of raids conducted	480:1,534 or 31%
Ratio of convictions to the number of cases brought	480:480 or 100%
Number of cases resulting in administrative fines	480
Total amount of fines levied	US\$10,000
US\$0-\$1,000	NA
\$1,001-\$5,000	NA
\$5,001-\$10,000	NA
\$10,000 and above	NA
Total amount of restitution ordered in how many cases (e.g. \$XXX in Y cases)	Approx US\$10,000 in 480 cases but only US\$7,637 recovered.

Raids Forthcoming, But Post-Raid Measures Largely Ineffective Due to Lack of Prioritization, Resources

Enforcement in the Philippines against pirate production facilities as well as against retail piracy largely remains marred by ineffective post-raid enforcement.²⁰ In 2003, the government of

¹⁹ In 2002, 35 retail raids and 3 optical disc plant raids were run by the recording industry enforcement group; from those and earlier raids, 147 pirate retailer cases and 2 cases against pirate optical disc factories were commenced.

²⁰ In fact, raiding is so ineffectual in the Philippines that immediately after any raid, in which there is only confiscation of goods, fresh stocks are made available again at the same spot, with the pirate reseller often going right back into business after six in the evening.

the Philippines needs to continue stepping up with sustained period of inspections, raids and seizures against retail establishments, as well as against all optical disc and other plants, known or underground, suspected of engaging in pirate production. However, such raids will mean little if they are not followed by swift prosecutions leading to the imposition of deterrent penalties.

At present, copyright owners' attempts to enforce their rights in the Philippines continue to be bedeviled by problems, for example: leaks to a suspect that a raid is coming, resulting in obvious and avoidable loss of evidence;²¹ 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);²² sometimes even 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 to the pirates of infringing goods and machinery used to produce such goods.²³ These systemic failures to deliver effective enforcement are keys as to why piracy has been a thriving business throughout the Philippines.

Even those bodies, like the Video Regulatory Board (VRB), that understand the problem of piracy and how to address it, remain under-funded, thus frustrating even their best efforts. IIPA commends the Chairman of the VRB for his activities since his appointment in July 2002 by President Arroyo, including a number of high profile raids. Specifically, there were four raids against VCD labs/factories between January to August 2002, and from all raids in 2002, the VRB impounded over five million discs and videocassettes, and several replicating machine lines.²⁴ This compares favorably with seizures made in 2001 of 300,000 discs and five replicating machine lines, but does not come close to eradicating the rampant optical disc piracy problem. It is also heartening that both the National Bureau of Investigation and the Video Regulatory Board, under its new leadership, appear to be carrying out more retail raids in early 2003; however, the key will be whether those raids are followed up with deterrent enforcement.

Enforcement in the Philippines to address other piracy problems has been less successful. For example, while the National Bureau of Investigation (NBI) has been of

²¹ One raid against an optical media plant run in conjunction with the recording industry in November 2001 failed because of a leak. AAP members also note that pirates often shut down their pirate book operations and move after being informed of an impending raid.

²² 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).

²³ Return of pirated copies and tools occurred in an August 2001 raid of an optical media plant, due to the challenge of the search warrant on purely technical grounds; replicating machinery, infringing music discs and stampers were returned. At least four more optical disc production lines in other cases have been released and returned due to the dismissal of cases or quashed of warrants. The U.S. book publishers report that warrants are so rigid that clearly infringing books are not seized in a raid, as well as machinery such as copy machines clearly used in the illegal activity.

²⁴ The National Bureau of Investigation claims that, "[f]rom January 2001 to the present, [it] was able to seize pirated and counterfeit goods with a total value of P2 billion [US\$37.1 million]." Rafael Ragos, head of NBI's intellectual property rights division, claims, "[w]e were able to confiscate 16 replicating machines, each worth P50 million [US\$927,000]." See Dave L. Llorito, *Intellectual Piracy a P9-billion Headache for Law Enforcers*, Manila Times, Jan. 3, 2003 (at <http://www.manilatimes.net/others/special/2003/jan/03/20030103spe1.html>).

assistance by investigating and successfully conducting several raids against end-user piracy of business software, such piracy remains low on its list of priorities, and cases are rarely initiated unless specific complaints are made by the right holders. The NBI has demonstrated a willingness to act on complaints filed by BSA, but only three such raids were carried out in 2001, and again in 2002.

Raiding statistics from 2002 indicate some sense of the need for enforcement bodies such as the VRB and NBI to coordinate their activities. Nonetheless, to date, despite some initial steps taken,²⁵ the government of the Philippines has failed to establish better coordination among investigative agencies, including the police, prosecutors, customs,²⁶ and courts, in raiding, investigating, prosecuting and seeking deterrent sentences from courts against egregious pirates.

Specialized IP Prosecutors Should be Reinstated in Order to Expedite Cases

Even when a successful raid is run, leading to seizures of pirate product, as well as the tools and implements used in the production of piracy, inadequate prosecutorial resources, procedural bottlenecks, and endless delays mar the post-raid enforcement system. Defendants can delay prosecutions and keep straightforward piracy cases out of the courts by employing means by which evidence can be examined and re-examined, including an appeal process all the way to the office of the Secretary of Justice. One hopeful sign had been the recognition on the part of the Secretary of Justice of the need to put into place a specialized cadre of prosecutors at the Department of Justice (DOJ), who are familiar with and able to handle cases involving copyright piracy. Unfortunately, two orders in late 2000 essentially disbanded the specialized prosecutorial team, due to the limited number of prosecutors available to deal with the general case workload, and in 2002, most piracy cases were referred to regional prosecutors, who have less experience dealing with copyright cases than the DOJ prosecutors, resulting in those cases languishing indefinitely.²⁷ Despite numerous requests by the copyright industries, reinstatement of the specialized IP prosecutors has not occurred.

Copyright piracy cases handled by regional prosecutors are almost always doomed. For example, formal complaints investigated by these prosecutors take months to complete, and decisions to prosecute are subject to appeal to the office of the Secretary of Justice. A stark example of the problems with prosecutorial delays in the Philippines involves a case in which a

²⁵ For example, the Intellectual Property Office (IPO) and the IP Coalition (including right holder groups) organized a general meeting in early 2002 to discuss possible plans of action for enforcement coordination.

²⁶ Little changed during 2002 to 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. The export problem in particular is considered likely to worsen as manufacturing activity continues to increase. The Bureau of Customs (BOC) has started to enforce laws relating to intellectual property rights and has conducted seizures at major seaports throughout the Philippines and at the international airport in Manila. Notwithstanding these commendable efforts, pirated products continue to enter the country in significant quantities.

²⁷ Two orders in 2001, Order No. 197 and Order No. 62, even further weakened effectiveness of prosecutors, since the government decided to give some of DOJ's prosecutorial powers to regional prosecutors, rather than being handled as "national" cases handled by DOJ itself. By the middle of 2001, right holders' objections resulted in DOJ agreeing to accept the filing of complaints, but as of 2002, DOJ would only handle a case itself if it was a matter of "national interest" (both VCD and end-user software piracy have been deemed *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.

retailer got caught in a raid in November 1995 with 2,800 units of unlicensed software. The Business Software Alliance received the DOJ's final decision not to prosecute in January 2001 – a full 62 months after the raid! A part of the reason for such delays is that the Department of Justice prosecutorial staff is under-manned, and those prosecutors are assigned to cases other than copyright. IIPA hopes a special prosecutorial task force to deal specifically with copyright will be reinstated, as any increase in the number of prosecutors and resources will likely increase the speed and efficiency of handling IPR complaints. The ideal would be for the DOJ to increase the number of prosecutors and introduce specialized training courses on IPR law and practice.

The Specialized IPR Courts Have Not Effectively Combated Piracy

The troubling fact is that even if a case makes it to the prosecutor and evidence is garnered to bring the case to court, such cases enter a judicial system that is crippled by lack of expertise and by the weight of backlogged caseloads. Regardless of the fact that some cases may make it through the courts, the fact remains that not one optical disc plant owner has ever been convicted in the Philippines.²⁸ Because litigation usually drags on for years, sometimes five years or longer, many right holders prefer to settle cases out of court. And while the Supreme Court has designated certain courts to hear intellectual property rights cases,²⁹ and its operating guidelines allow for expeditious decisions, in practical terms, the designated courts do not exclusively hear intellectual property cases but cases involving all other matters as well, resulting in backlogged dockets that severely diminish the courts' efficiency. The result is that all aspects of a court case, from pre-trial procedures such as applications for search warrants, to applications for *ex parte* search orders (granted without the presence of the defendant), to adjudication of level of fines or damages, are fraught with delays and problems. Criminal prosecutions, when brought, have very long gestation periods and little deterrent effect on pirates, with most cases taking up to an average of six years to reach judgment.

Starting with the 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. The presiding judges are unfamiliar with laws relating to intellectual property rights, often requesting that right holders provide a copy of and explain the relevant law. In some instances, the judge fails to realize the urgency of the application, and lengthens the hearing on an application for a search warrant to several days. Similar problems plague applications for *ex parte* civil searches, now governed by the January 2002 Supreme Court "Rules on Search and Seizure in Civil Actions for Infringement of Intellectual Property Rights."³⁰

²⁸ IIPA notes with dismay that the accreditation of Discmaker, which was raided last October 2002 and found to be blatantly replicating pirate CDs and VCDs, has not yet been revoked, and an administrative hearing against Discmaker on the revocation of its license has not even occurred.

²⁹ 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, or are promoted or transferred, further weakening the effectiveness of these courts, and lessening any benefit gained out of training.

³⁰ A more detailed discussion of the Supreme Court "Rules on Search and Seizure in Civil Actions" (issued January 22, 2002) appears in the 2002 Special 301 report for the Philippines, available at <http://www.iipa.com/rbc/2002/2002SPEC301PHILIPPINES.pdf>. Essentially, the Rules give courts authority to issue *ex parte* civil search orders, thereby addressing a long-standing deficiency in the legal system in the Philippines. In that discussion, IIPA noted some fundamental issues that either were not addressed in the Rules, or for which the Rules as promulgated leave

Applicants have been required in practice to post unreasonably high cash bonds/surety bonds in favor of the defendant. IIPA supports the Supreme Court deriving a list of “independent commissioners” to conduct searches under the Rules.

Further, in copyright infringement cases in the Philippines, it is very difficult to recover damages if no amicable settlement is reached (because criminal and civil cases are consolidated), and many private complainants are so fed up by judicial delays that they sometimes do not present evidence in a civil case to allow the trial process to finish faster.

The primary vindication then that the private complainant aims for is the deterrent effect that may result from the publicity generated by a conviction. 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 e-commerce legislation, 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 more than 60 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 three cases with the prosecutions department and eight active criminal cases in court including one case on appeal.³¹

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.³² 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. Pending legislation (a “Convergence Bill”) may provide some relief, but consideration of this bill has progressed slowly and the draft contains many provisions that require further clarification.³³

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. Also, the requirement of a “strong” prima facie case may leave the threshold for obtaining provisional measures unreasonably high [Section 6(b)], which would implicate the Philippines’ TRIPS compliance. Further, right owners should not be held liable for improper actions by the authorities (Sections 9 and 21), 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. For further discussion, please see IIPA’s 2002 Special 301 report.

³¹ 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.

³² Other important provisions in the draft cable law include some loosening of advertising restrictions and stiffer penalties for cable piracy.

³³ IIPA also understands that the bill contains foreign investment restrictions within certain sectors of the copyright industry.

Restrictions on Advertising on Pay Television

Under Presidential Decree 1986, advertising on pay television is currently limited to 10 minutes per hour of programming. Provisions in various draft cable bills we have seen limiting advertising time to between 5 to 10 minutes per hour are among the strictest in the region.

COPYRIGHT LAW AND RELATED ISSUES

Optical Disc Law Has Neither Been Passed Nor Implemented

An effective optical disc law in the Philippines will aim to weed out optical disc pirates, through robust licensing and controls over optical disc production, controls on imports of production equipment (including stampers and masters) and raw materials, as well as requirements to use unique source identifiers to track the loci of production.³⁴ Passage of an effective optical disc law alone will not suffice, however, without well-publicized enforcement of the law, including: enforcement against unregistered plants and against registered plants with regard to license terms compliance; seizure of illegal goods and equipment at plants, including the destruction of discs seized; and impoundment until prosecutions are successfully resolved. In last year's report, IIPA recognized that the government of the Philippines had been

³⁴ The global copyright community has agreed that the key elements of an effective optical disc law include:

- 1) Licensing of Facilities:** Centralized licensing (for a fixed, renewable term, no longer than three years) of manufacturing of optical discs and "production parts" (including "stampers" and "masters"), including requirements like production take place only at the licensed premises, a license only be granted to one who has obtained "manufacturer's code" (e.g., SID Code) for optical discs and production parts, licensee take measures to verify that customers have copyright/trademark authorization of the relevant right holders, etc.
- 2) Licensing of Export/Import of Materials:** Centralized licensing of export of optical discs, and import/export of production parts (including "stampers" and "masters"), raw materials or manufacturing equipment (an automatic licensing regime consistent with WTO requirements).
- 3) Requirement to Apply Manufacturer's Code:** Requirement to adapt manufacturing equipment or optical disc molds to apply appropriate manufacturer's code, and to cause each optical disc and production part to be marked with manufacturer's code, and prohibitions on various fraudulent/illegal acts with respect to manufacturer's codes (including making, possessing or adapting an optical disc mould for forging manufacturer's code; altering, gouging or scouring a manufacturer's code on or from a mould or any disc; selling a production part not marked with manufacturer's code, etc.).
- 4) License Record Keeping Requirements:** Requirement to keep various records, for example, machinery and raw materials, orders received, quantity of raw materials, exemplars of each optical disc title manufactured, etc.
- 5) Registration Requirement for Commercial Optical Disc Duplication:** Requirement that commercial establishments that record copyrighted materials onto recordable optical discs for purposes of sale or other commercial dealings register with the government prior to engaging in such "commercial optical disc duplication," giving the names and addresses of the responsible persons and the address of the premises at which the duplication takes place.
- 6) Plenary Inspection Authority:** Possibility of inspection, without notice, at any time, to examine licensed or registered premises; prohibition on obstructing raid; possibility of forcible entry; possibility for right holder organization to assist; etc.
- 7) Search and Seizure Authority:** Plenary authority to: enter and search any place, vessel, aircraft or vehicle; seize, remove, detain or seal contraband or other evidence of a violation of the law; forcibly enter when necessary; prohibit the removal of seal applied; etc.
- 8) Government Record-Keeping Requirements:** Maintenance of a register of applications filed and production licenses granted, available for public inspection; maintenance of a record of all inspection actions made publicly available; etc.
- 9) Criminal Penalties for Violations:** Violation of any significant aspect of the regime is criminally punishable, including individual liability (fines and/or imprisonment).
- 10) Possibility of Withholding, Suspending, or Revoking a License for Prior Copyright Infringement, Fraud in the Application Process, or Violation of the Optical Disc Law.**
- 11) Possibility of Closure of a Plant.**

considering enactment of a strong optical disc law. However, it is one year later, and we are deeply disappointed that, to date, no law has been passed by the Congress, nor implemented at the practical level. A very good House Bill passed its second reading before the House plenary on October 16, 2002, without any opposition or substantive debate.³⁵ The third and final reading was supposed to take place soon after Congress resumed on January 13, 2003, but this did not occur to our knowledge. It is imperative that the Senate follow the House's lead to pass a similar bill.

Electronic Commerce Act (2000) Provides Tools to Fight Copyright on the Internet

While still a relatively minor 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 2000,³⁶ 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)].³⁷ That Act, however, also contains one very troubling provision limiting liability of certain telecommunications service providers for, among other things, infringement of the exclusive rights of copyright owners that are carried out over their systems, but Section 30 of 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; some voluntary arrangements demonstrate promise that workable cooperation may ensue between right holders and telecommunication services in the Philippines. In 2002, the Business Software Alliance sent 21 takedown notices and had a 100% success rate with the ISPs in taking down the infringing materials.

The fundamental concern about the Act remains that it is premature to immunize service providers from liability for infringement of copyright when the exclusive rights of copyright owners have not yet clearly been spelled out in the Intellectual Property Code. While Section 33(b) of the Electronic Commerce Act makes violations of copyright in the digital environment criminal offenses, the basis for civil liability remains murky. It 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

³⁵ The Bill as we know it successfully addresses key elements 1-4, 6-7, and 9-11 noted above. It does not expressly address the growing global problem of "burning" of content onto recordable optical discs, nor does it contain robust government record-keeping requirements.

³⁶ Republic Act No. 8792 (2000).

³⁷ 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\$1,854).

representing copyright owners. Other industries have been successful in cooperating with ISPs in addressing piracy on digital networks, albeit in a limited way.³⁸

Philippines Passage of Copyright Law Amendments to Modernize Protections Stalled

While IIPA was very hopeful to be able to report passage of Senate Bill 1704 and House Bill 3182, those bills have apparently stalled. Moreover, IPO may be considering the preparation of an “omnibus IP bill” covering copyrights, patents and trademarks. We believe this is a mistake, as it would slow the process considerably. The Philippine government should be commended for taking the necessary steps to accede to and deposit the WIPO “Internet” treaties, the WCT and WPPT. Those treaties went into force in the Philippines on October 4, 2002 and now should be fully implemented. Senate Bill 1704 and House Bill 3182 would have fully implemented TRIPS and the WIPO “Internet” treaties.³⁹

Issuance of New Customs Administrative Order is Encouraging, But Enforcement On-the-Ground is Still Lacking

On September 23, 2002, the Commissioner of Customs issued Customs Administrative Order No. 6-2002, intended to implement the Customs-related provisions of the TRIPS Agreement (Articles 51-60). This Order enhances Customs’ ability to seek border enforcement, including by providing a mechanism for the IPR owners to request Customs to issue an alert or hold order against the import of a consignment of suspected infringing goods, as well as through the establishment of an IP Unit at Customs dedicated to border enforcement. The provision allowing data- and intelligence-sharing with other enforcement agencies and the industry also has the capacity to greatly improve the effectiveness of enforcement operations. However, the Order should be enhanced to deal with enforcement against suspected infringing exports, and Customs officials should be given the power to arrest in addition to its other investigative powers.

Philippines to be Congratulated Upon Joining the WCT and WPPT

The Philippines deposited its instruments of accession to both WIPO “Internet” treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) on July 4. Both treaties entered into force as to the Philippines on October 4, 2002. This makes the Philippines the first country in Asia to accede to both treaties (Japan acceded to the WPPT on October 9, 2002). IIPA congratulates the Philippines on joining these treaties that form critical parts of the basic legal framework for healthy electronic commerce, and that positions it as a leader within the APEC and ASEAN communities in the adoption and

³⁸ The recording industry, for example, sent two cease-and-desist letters in 2001 to Philippine ISPs with respect to infringing MP3 files. A positive response was received for one letter.

³⁹ A more detailed discussion of the contents of Senate Bill 1704 and House Bill 3182 appears in IIPA’s 2002 Special 301 report on the Philippines, which can be found at <http://www.iipa.com/rbc/2002/2002SPEC301PHILIPPINES.pdf>.

implementation of modern intellectual property regimes.⁴⁰ These treaties establish the framework for the protection of copyrighted works as they travel over the Internet, and without which, content providers are unlikely to place their valuable works on the Internet, which will retard the development of electronic commerce on a global basis. The legal framework provided in the WIPO treaties is also critical to combating Internet piracy. IIPA encourages the government of the Philippines to proceed to fully implement those treaties, which could be done easily through passage of Senate Bill 1704 and House Bill 3182.

⁴⁰ Coming out of the October 2002 APEC Ministerial in Los Cabos, Mexico, was the “Statement to Implement APEC Policies on Trade and the Digital Economy” (Leaders’ Statement), including the following statement regarding WIPO treaties ratification/implementation:

[APEC Member Economies] will ratify and fully implement the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty as soon as possible. If an Economy is a non-Member of WIPO, it will implement the provisions of these treaties as soon as possible. For any Economy in the process of reviewing accession or implementation, it will commit to completing that review as soon as possible.