

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

PHILIPPINES

EXECUTIVE SUMMARY

Special 301 Recommendation: The Philippines should remain on the Priority Watch List, and an out-of-cycle review should be conducted later in 2004 to determine whether the new optical disc law has been implemented, whether inspections and enforcement activities against unauthorized optical disc plants have effectively curtailed pirate production, and whether adequate actions have been taken against pirate reprinters and photocopy shops.

Overview of Key Achievements/Problems: Pirate optical discs (CDs, VCDs, DVDs, CD-ROMs) of copyrighted materials (music, audio-visual, business and entertainment software, and published materials) continue to be imported into the Philippines from Malaysia, Thailand, China, Hong Kong, and Taiwan, decimating the domestic market. Other problems include end-user piracy of business software, book piracy (reprints and unauthorized photocopies), and piracy occurring on the Internet (including in Internet cafes, where the majority of entertainment software used is illegal). The Videogram Regulatory Board (VRB) remained one of the success stories of 2003 for the Philippine government in the fight against piracy, successfully prosecuting two cases to final conviction. On February 9, 2004, President Macapagal-Arroyo signed into law a new optical disc law. As a result, the VRB will be reorganized into a new Optical Media Board (OMB) (with new head of the VRB Edu Manzano, who replaced Ramon "Bong" Revilla). This new grouping must be even more active and successful in the fight against piracy than the VRB has been. The prosecutorial and court systems remain marred by delays, procedural hurdles, a lack of IP expertise in the Department of Justice, clogged court dockets, and a lack of specialized IP courts, resulting in IP cases being given low priority.

Actions to be taken in 2004

- Run sustained enforcement raids against pirate optical disc production facilities, seizing and destroying, dismantling and impounding illegal goods and equipment.
- Run coordinated sustained raiding, including against pirate book reprint facilities and photocopy shops, cable pirates, and businesses or Internet cafés using unauthorized software; monitor progress toward prosecutions.
- Training and closer liaison with the Bureau of Customs (BOC) and Philippine Postal Service (Philpost) to shore up the flood of pirated optical discs being smuggled into the country.
- Clear backlogs of investigations and court cases.
- Reinstate specialized IP prosecutors in the Department of Justice.
- Ensure that expert judges handle copyright cases (consider reinstating specialized IP court).
- Ensure that the new "Optical Media Board" (OMB) is fully funded through the Congress and that the new OD law is implemented immediately.
- Pass draft copyright law amendments (S.B. 1704 and H.B. 3182) to fully implement the WIPO "Internet" treaties.
- Announce an end to the amnesty with regard to "sell-off" of supposedly P.D. 1203 compulsory reprints of books; start enforcing against those who attempt to continue to exploit P.D. 1203; reject consideration of "Lacson" Bill that would violate TRIPS by allowing compulsory reproduction of books for schools.

For more details on Philippine's Special 301 history, see IIPA "History" Appendix to this filing.¹ Please also see previous years' reports on the Philippines.²

PHILIPPINES
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 - 2003³

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	33.0	89%	30.0	80%	28.0	80%	25.0	70%	18.0	65%
Records & Music ⁴	22.2	40%	20.9	40%	23.9	36%	1.4	33%	2.0	20%
Business Software ⁵	NA	NA	25.0	68%	19.9	63%	21.8	61%	26.7	70%
Entertainment Software	NA	95%	NA	NA	NA	99%	41.0	98%	23.8	89%
Books	45.0	NA	45.0	NA	44.0	NA	44.0	NA	44.0	NA
TOTALS⁶	NA		120.9		115.8		133.2		114.5	

COPYRIGHT PIRACY IN THE PHILIPPINES

Copyright Piracy Decimates the Domestic Market in the Philippines

Notwithstanding some raids on retail establishments and production factories in 2003, particularly by the VRB, pirates remain emboldened and continue to ruin the legitimate domestic markets in the Philippines. Pirate optical discs flood the Philippines' market from places like Malaysia, Thailand, China, Hong Kong, and Taiwan. Pirate product in many formats (music CDs, VCDs, DVDs, CD-ROMs containing pirate business software, entertainment software for personal computer, Xbox[®], PlayStation2[®], GameBoyAdvance[®], and pirate copies of published or reference materials) is available virtually everywhere, displacing legitimate retail sales.⁷ The market for movies is hurt in part due to the affordability of hardware (imported primarily from China and Taiwan) for playing VCDs and DVDs, creating a market for pirated discs of movies not yet released in the theaters as well as previously released titles. Market share for pirate DVDs (versus VCDs or videocassettes) climbed from 30% in mid-2002 to 60% by mid-2003, as unit prices dropped from US\$3.50 to P80 (US\$1.40) over the same period. There was a significant escalation in the amount of "burned" pirate CD-Rs in 2003, due at least in part to the low costs of production.

¹ <http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>

² <http://www.iipa.com/countryreports.html>.

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

⁴ Losses to the U.S. recording industry calculated beginning from 2001 are represented by estimated displaced sales in the Philippines. Prior to 2001, losses were calculated based on the value of pirate sales at pirate prices.

⁵ BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com/>. BSA's statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflect losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

⁶ In IIPA's 2003 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in the Philippines for 2002 were \$116.0 million. IIPA's revised loss figures are reflected above.

⁷ For example, several areas in Metro Manila are considered to be video piracy hotspots: Quiapo in Manila, Greenhills in San Juan, ABC Mall in Makati City and Cubao in Quezon City.

U.S. book publishers suffer from pirate photocopies and reprints of textbooks and other publications, mainly in the academic environment, but also from piracy of professional medical books. 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 of piracy of published materials persists, and attitudes among some university officials, and even professors (many of whom are authors themselves!) are truly appalling. U.S. publishers also suffer from pirate printing of medical books, with the pirates selling at medical conventions and door-to-door at hospitals and doctor's offices. Another problem is that pirates continue to claim they are exempt under an ancient compulsory license (Presidential Decree No. 1203) which was repealed in 1997! The Philippine government must stop permitting pirates to claim this exemption by issuing a directive indicating that P.D. 1203 may no longer be invoked and instructing authorities to take raids against pirate booksellers and printers.

The motion picture industry also suffers from the unauthorized transmission of motion pictures on hundreds of cable systems in the country, the theft of satellite signals of home entertainment channels, and traditional pirate sales of videocassettes (which is most severe in Manila, but has spread to the provinces as well in 2003). Although cable systems outside Manila are regulated, there was still a proliferation of infringing transmissions in 2003, including transmissions of newly-released motion pictures repeated several times a day. The National Telecommunications Commission (NTC) monitors the operations of licensed and non-licensed cable TV operators, but other than issuing the occasional warning letter, has not been effective in curbing cable TV piracy. Despite mounting complaints aired by the foreign content providers on the continuous piracy of signals in even the most remote areas in the Philippines (particularly in the Mindanao area), NTC officials insist they have no jurisdiction over copyright violations, nor any enforcement resources, and that the responsibility for enforcement lies with the Intellectual Property Office (IPO). Foreign content providers have consistently argued that NTC must be able to suspend or cancel licenses of local cable TV operators found to be pirating programs. A proposed Cable Bill has languished in the National Assembly for five years, leaving a vacuum in this area.

End-user software piracy remains the most serious threat to the business software industry in the Philippines. After five years of steady declines, the end-user software piracy rate rose from 63% in 2001 to 68% in 2002. About 1,500 Internet cafés are in operation in the Philippines, and estimates are that virtually all of these establishments profit from unauthorized exploitation of the most popular entertainment software titles (99% unlicensed).

Optical Disc Pirate Production for Export Remains a Serious Concern

Currently, IIPA can verify the existence of 7 optical disc plants having roughly 21 production lines operating in the Philippines, with an estimated overall production capacity of 73.5 million discs per year,⁸ many multiples of any rational legitimate domestic demand for discs in the Philippines, which is estimated at 7 million discs per year. The result is overproduction for the domestic market. Covert production facilities, often protected by law enforcement and local government officials, remain in existence in both remote areas of Luzon and within the major cities. Currently it is believed that such manufacturing facilities only produce pirated optical discs

⁸ Estimated production capacity of finished optical discs is ascertained by multiplying the number of production lines (excluding blank CD-R) times 3.5 million; this is by all accounts considered a conservative estimate.

in VCD and CD-R format. However, there is the increasing concern that the Philippines may soon become a manufacturing hub of optical discs in the DVD format, for both local consumption and for export.

COPYRIGHT ENFORCEMENT IN THE PHILIPPINES

THE PHILIPPINES CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2003

ACTIONS	MOTION PICTURES	BUSINESS SOFTWARE
Number of raids conducted	1,957 ⁹ 545 ¹⁰	3
Number of VCDs seized	859,003	
Number of DVDs seized	1,309,621	
Number of CD-Rs seized	843,969	
Number of investigations	2,126	
Number of VCD lab/factory raids	2	
Number of cases commenced	2	1
Number of Indictments		
Number of defendants convicted (including guilty pleas)	12	0
Acquittals and dismissals	0	0
Number of cases Pending	543	12 ¹¹
Number of factory cases pending	3	
Total number of cases resulting in jail time	1	0
Suspended prison terms	0	
Maximum 6 months	N/A	
Over 6 months	N/A	
Over 1 year	N/A	
Total suspended prison terms	0	
Prison terms served (not suspended)		
Maximum 6 months	1	
Over 6 months	0	
Over 1 year	0	
Total prison terms served (not suspended)	1	
Number of cases resulting in criminal fines		
Up to \$1,000	N/A	
\$1,000 to \$5,000	N/A	
Over \$5,000	N/A	
Total amount of fines levied (in US\$)	N/A	

THE PHILIPPINES CIVIL COPYRIGHT ENFORCEMENT STATISTICS FOR 2003

ACTIONS	BUSINESS SOFTWARE ¹²
Number of civil raids conducted	0
Post-search action	0
Cases pending	0
Cases dropped	0
Cases settled or adjudicated	3
Value of loss as determined by right holder (\$USD)	\$221,352.11
Settlement/judgment amount (\$USD)	No Judgments

⁹ Inspection Orders.

¹⁰ Including three search warrants for VCD labs/factories.

¹¹ There are four cases pending, and eight cases pending on appeal with the Department of Justice, Court of Appeals and Supreme Court.

¹² All raids for 2003 were conducted based on search warrant applications which result in criminal liability.

THE PHILIPPINES ADMINISTRATIVE COPYRIGHT ENFORCEMENT STATISTICS FOR 2003

ACTIONS	MOTION PICTURES
Number of raids/searches conducted	1,960
Number of administrative cases brought by agency	1,960
Number of defendants found liable (including admissions/pleas of guilt)	0 ¹³
Ratio of convictions to the number of raids conducted	
Ratio of convictions to the number of cases brought	
Number of cases resulting in administrative fines	
Total amount of fines levied	
US\$0-\$1,000	
\$1,001-\$5,000	
\$5,001-\$10,000	
\$10,000 and above	
Total amount of restitution ordered in how many cases (e.g. \$XXX in Y cases)	

Steps to Coordinate Enforcement

The government of the Philippines attempted to take several steps to coordinate efforts toward a more effective regime to eradicate piracy. For example, in June 2003, a new, broad-based coalition composed of private organizations and government agencies was formalized, called The Intellectual Property Rights Enforcement Action Panel (IP-REAP).¹⁴ In mid 2003, the VRB signed Memoranda of Understanding (MOUs) with both the Philippine National Police (PNP) and the Bureau of Customs (BOC) to enhance joint enforcement action against piracy. Such agreements have been partially successful. In September 2003, President Arroyo declared (through Proclamation 448) that the month of October of every year would be "National Anti-Video Piracy Month." Finally, with final passage of the new optical disc law, the Optical Media Board will be established – another multi-agency group tasked with eradicating unauthorized production of optical discs.

Some Raiding Occurred, But No Deterrent Effect

Notwithstanding these various efforts to coordinate enforcement, results in 2003 varied by industry, and no industry reported reductions in piracy levels as a result of enforcement actions taken in 2003. For example, the VRB registered video establishments in an attempt to eradicate piracy of audiovisual materials, and then proceeded to inspect unregistered establishments. From January to August 2003, VRB registered 272 video establishments for the first time, and renewed 553 out of 1,824 licenses granted in 2002.¹⁵ According to VRB records from inspections and raids (against unregistered locations), from January to August 2003, VRB impounded nearly 2.5 million discs, at least five optical disc production lines and 273 CD-R burners.¹⁶ In one of the raids in March 2003, it was discovered that the two optical disc lines

¹³ Cases are dropped after 15 days from date of seizure and nobody claims the items.

¹⁴ *Intellectual property rights tie-up forged*, Business World, June 19, 2003. IP-REAP is made up of the Intellectual Property Office (IPO), Department of Justice, NTC, VRB, Philippine National Police, Bureau of Customs, IP Coalition, Council to Combat Piracy and Counterfeiting of Patents, Copyrights and Trademarks, Intellectual Property Association of the Philippines, Philippine Internet Commerce Society, Electronics Industry Association of the Philippines, Quezon City Chamber of Commerce and Industry, and Davao City Chamber of Commerce and Industry.

¹⁵ Unregistered locations generally deal in piracy. The motion picture industry noted an increase in the number of stalls selling pirated optical discs in 2003: from 177 on January 31, 2003, to 229 on March 31, 2003.

¹⁶ To demonstrate the magnitude of the raids, two major raids conducted at the notorious Bartertrade Center in February 2003 resulted in the seizure of around 461,500 pirate optical discs. See *Macapagal sees destruction of*

seized had been seized once before in August 2001, but were returned to the pirates after the 2001 proceedings were quashed.¹⁷ The National Bureau of Investigation (NBI) has traditionally been much less active than the VRB, and in 2003 conducted several raids against corporate end-user piracy of business software. The raids against corporate end-users of business software revealed a complete disregard for software licensing on the part of the companies raided.¹⁸ There were virtually no actions taken in 2003 against book piracy.

Procedural Problems in Raids

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; delays in obtaining search warrants (sometimes because the IPR judge does not hear the request for the warrant, and the presiding judge is unfamiliar with IPR laws); "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); and the requirement that an informant corroborate his allegations with sworn evidence of a witness.¹⁹ IIPA members continue to provide training when the opportunity arises in order to improve the situation and resolve some of these difficulties.²⁰

Lack of Specialized IP Prosecutors

The disbanding of specialized IP prosecutors as a result of two orders in late 2000 has resulted in most piracy cases being referred to regional prosecutors, who have less experience dealing with copyright cases than the Department of Justice prosecutors. As a result, 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 asking for evidence to be examined and re-examined, including an appeals process all the way to the office of the Secretary of Justice. Formal complaints investigated by regional prosecutors take months to complete (in one case more than five years), and decisions to prosecute are subject to endless appeals to the office of the Secretary of Justice.

First Major Convictions Against Pirates in 2003

In a positive development, two cases in the Philippines resulted in convictions of major pirates in 2003. On April 4, 2003, the Bulacan Regional Trial Court found seven Indonesian nationals and five Chinese nationals guilty of illegal production of DVDs and music CDs under

pirated audio, video CDs, NQ7.net, Nov. 13, 2003, at http://www.inq7.net/brk/2003/nov/13/brkoth_10-1.htm.

¹⁷ That action also demonstrated the international and organized nature of the crimes being committed, since six workers from China and two Indonesians were arrested for immigration violations.

¹⁸ Erwin Lemuel G. Oliva, *P37M worth of pirated software seized in NBI raid*, INQ7.net, Jun. 18, 2003 (in which an estimated 37.2 million pesos worth of pirated software and 223 computers were confiscated by NBI during a raid of several establishments in San Pablo City in Laguna province).

¹⁹ For a detailed discussion of problems previously experienced, please refer to our 2003 Special 301 submission on the Philippines, at <http://www.iipa.com/rbc/2002/2002SPEC301PHILIPPINES.pdf>.

²⁰ For example, the Business Software Alliance conducted training for the IPR division of the NBI on August 21-23 on corporate end-user piracy and software licensing issues. This training involved the nuts and bolts of an end-user case from intelligence gathering to raiding and collecting evidence to ensuring a successful prosecution. The Motion Picture Association conducted a number of training workshops on "product identification and cross border smuggling of pirated optical discs" for the VRB, Bureau of Customs and the Philippine Postal Service.

Sections 6 and 7 of Presidential Decree 1987 (“An Act Creating the Videogram Regulatory Board”). The case was prosecuted by Bulacan Provincial Prosecutor, and is, according to the VRB, the first successful conviction for video piracy by the VRB since its creation in 1985. The 12 defendants (all foreigners) were each sentenced to jail terms ranging from three months and one day to one year in prison and were ordered to pay fines totaling P1.2 million (approximately US\$23,000). They were or will be deported after serving their sentences. The case took seven months to complete. Although the reasonably quick processing of the case through the Court is welcomed as an indication of the new-found conviction of the government to deal with piracy, the result is in stark contrast to years of inaction and inordinate delay that has continually plagued the Philippines’ enforcement system. In another case, a Legaspi City court convicted a couple, also under Sections 6 and 7 of P.D. 1987, for illegal production of CDs and DVDs, resulting in sentences of three months and a day to one year of imprisonment each, without probation, and fines of P50,000 each for each offense.²¹

Three similar convictions in plant cases were achieved in 2003, but all resulted from guilty pleas by those operating the plants. In every case the defendants were illegal immigrants and by the time their cases reached the court they had already been detained longer than they might have served upon conviction. In each case, pleading guilty resulted in their deportation; meanwhile, the operators/controllers of the plants have never been arrested or tried.

Most Court Cases Are Marred by Delays and Non-Deterrent Results

By contrast with the successful prosecutions, which are the exception rather than the rule, the Philippine justice system remains on the whole largely ineffective in dealing with piracy cases. Most copyright litigation drags on for years. All aspects of a court case, from pre-trial procedures such as applications for search warrants (as noted above), to applications for *ex parte* search orders (granted without the presence of the defendant),²² to imposition of fines or damages, are fraught with delays and problems (many cases running up to four years, which remain in preliminary processes, such as challenges to warrants, etc.). It remains very difficult to recover damages in the Philippines in a civil case, and thus many right holders prefer to settle cases out of court.

The creation of the Intellectual Property Courts in 1995 was designed to achieve a more expeditious and effective management of intellectual property rights cases; however, on June 17, 2003, the Philippine Supreme Court, by Administrative Memorandum No. 03-03-03 SC (effective July 1, 2003), ordered the consolidation of the Intellectual Property Courts with the previously-designated Commercial Courts, into new “Special Commercial Courts.”²³ This consolidation has only exacerbated problems previously experienced, since now it is even more likely that the judge hearing a copyright case will be unfamiliar with the laws, the need for swift adjudication, and the need for adequate compensatory damages and deterrent sentencing. It also remains the case that under the 1998 Intellectual Property Code, there has not been a single criminal conviction for business software piracy or music piracy, although in 2003 there were a couple of guilty pleas for music piracy. Presently, the business software industry has

²¹ Marinel R. Cruz, *Two more video 'pirates' convicted*, Philippine Daily Inquirer, May 3, 2003.

²² Applications for *ex parte* civil searches are now governed by the January 2002 Supreme Court “Rules on Search and Seizure in Civil Actions for Infringement of Intellectual Property Rights.” 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>.

²³ The Regional Trial Court, Branch 24 in Manila has also been designated as an additional Special Commercial Court.

three cases with the prosecutions department and 13 active criminal cases in court, including one case on appeal.

Customs Attempts to Become More Active in IP Enforcement

The Bureau of Customs (BOC) has taken several steps in the past two years to get more heavily involved in copyright enforcement, and conducted some seizures at major seaports throughout the Philippines and at the international airport in Manila in 2003.²⁴ Customs Administrative Order No. 6-2002 of September 23, 2002 was issued to implement the Customs-related provisions of the TRIPS Agreement (Articles 51-60), and expressly provides that a good “which constitute a piratical copy or likeness of any work, whether published or unpublished on which copyright subsists” may not be imported into the Philippines. The BOC is required to maintain an Intellectual Property Rights Registry where intellectual property holders may record their rights, and a mechanism to request Customs to issue an alert or hold order against the import of a consignment of suspected infringing goods. 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. By virtue of the Order, an “Intellectual Property Unit” within BOC was formed, and in June 2003, a Memorandum of Agreement was signed between the BOC and the VRB to enhance operational assistance. Notwithstanding these efforts, as of January 2004, BOC was still in the process of submitting to the Philippine Department of Finance a work plan for the creation of a permanent intellectual property service or division. In the meantime, pirate products continued to enter the country in significant quantities in 2003.

MARKET ACCESS ISSUES

Restrictions on Foreign Ownership of Mass Media and Advertising

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.²⁵ As the broadcast industry moves toward a converging environment, operators are encouraged to provide both infrastructure and content; it is essential in this environment that foreign equity restrictions such as those found in the Philippines be removed. Pending legislation (a “Convergence Bill”) may provide some relief, but consideration of this bill stalled in 2003.²⁶

Under Presidential Decree 1986, advertising on pay television is currently limited to 10 minutes per hour of programming. Provisions in the current draft cable legislation also unduly limit advertising to 10 minutes per hour, and require exhibition at the start and/or end of the

²⁴ In actions taken in December 2003 and January 2004, 2.8 tons of DVDs imported by air from Malaysia were seized by Customs.

²⁵ Other important provisions in the draft cable law include some loosening of advertising restrictions and stiffer penalties for cable piracy.

²⁶ IIPA also understands that the bill contains foreign investment restrictions for some copyright industry sectors.

program only. Restricting advertisement placement will tend to reduce the utility of advertising, leading to a reduction in advertising-based revenue, further impeding the development of the television industry in the Philippines.

COPYRIGHT LAW AND RELATED LEGISLATION

Optical Disc Law Enacted

On February 9, 2004, President Macapagal-Arroyo signed into law the “Act Regulating Optical Media, Reorganizing for This Purpose the Videogram Regulatory Board, Providing Penalties Therefor, and for Other Purposes.” The Philippine government is to be congratulated for this long awaited achievement. The Act must now be implemented swiftly, since it will go into force 15 days after being published in the gazette. We note the following regarding the transition period:

- The existing VRB will “continue to perform their duties and functions in a hold-over capacity,” meaning enforcement action by the VRB can continue (Section 24); current appropriations from the VRB are provided to the new OMB to start up its activities but thereafter the OMB must appropriate its own budget (Section 31).²⁷
- Implementing regulations must be drawn up within three (3) months of the effective date, and given to the “Congressional Oversight Committee” on the OMB (COC-OMB) (after which COC-OMB has 30 days to approve the regulations). Given the urgency needed to address the optical disc piracy problem, IIPA urges the government to draft and submit implementing regulations on an even swifter timetable than that called for by the Act.

The Act will provide a solid basis for establishing control over the production of optical discs (and stampers and masters) in the Philippines, as well as monitoring the movement of equipment and raw materials used to manufacture discs.²⁸ The following are some discussion points and some examples of issues which must be corrected in implementing regulations:

- **Coverage of Blank Media:** The Act provides for a licensing regime for the manufacture of pre-recorded optical discs, but the definitions of “optical media” and “manufacture” do not appear to cover “blank” or “recordable” media. Failure to cover blank and recordable media leaves a serious gap in the regime which should be remedied.
- **Increase Criminal Fines and Provide for Some Additional Offenses:** The Act establishes criminal penalties (including mandatory prison sentences) that, if imposed at the maximum levels, should have a deterrent effect on illegal manufacture of optical discs. Criminal fines, however, are generally too low. The maximum fine for a first offense of producing optical discs without a license is US\$27,000, which will generally be non-deterrent against a plant mass-producing pirate optical discs. The Act should also deem the following as offenses: 1) manufacturing/producing discs at a place other than the licensed premises, 2) deliberate misrepresentations, or false/misleading information in applying for a license from the OMB, or in submitting required information under the Act, and 3) forging a license document or using an expired license document.
- **Gouging of Identification Codes Should Be Prohibited:** Section 19(a)(5) of the Act prohibits use of false or unauthorized identification codes. It should be confirmed whether

²⁷ In mid-2003, it appeared that Senator Oreta had succeeded in convincing Philippine lawmakers to support allocating an initial fund of P200 million (US\$3.6 million) to the OMB, but this did not survive markups.

²⁸ The Act also closely tracks the “Effective Practices Regarding Optical Disc Production” paper that was endorsed by Ministers at the APEC Ministerial in Bangkok in late 2003.

Section 19(a)(5) also prohibits the practice of “gouging” or otherwise removing identification codes from discs.

- **Authority to Seize:** Section 19(b)(3) of the Act deals with seizure of discs and equipment during an inspection or raid, and expressly applies to materials “found during inspection operations to be in violation of the provisions of this Act.” Section 19(b)(3) should also be applicable to all items ‘which the OMB has the authority to inspect, detain, or seize.’
- **“Good Faith” Defense Must Be Deleted or Modified:** Section 19(b)(2) makes it an offense to produce discs knowing that the customer ordering the discs does not have authorization from a right holder, but appears to make it a defense if the manufacturer gives the OMB five days’ notice of any transaction entered into and furnishes all material information about the transaction. Section 19(b)(2), para. 2 should be deleted; at least implementing regulations can clarify that verification of the material information submitted must be obtained from the OMB/relevant right holders in order for the manufacturer to qualify for a “good faith” defense.
- **Coverage of “Burned” CD-Rs:** It appears the drafters (e.g., in Section 19(c)) intend to prohibit certain activities with regard to “items . . . produced in violation of this Act, or “optical media that are in violation of this Act.” It should be clarified that these provisions apply to illegal CD-R “burning,” which would greatly strengthen the scope of the law. It also appears that the definition of “manufacturing equipment” may be used to cover CD-R machinery, which would at least permit this machinery to come under the statute when used for commercial purposes.

Passage of Cybercrime Bill, with Electronic Commerce Act, Could Provide Needed Tools to Fight Copyright Piracy on the Internet...

In 2003, the government of the Philippines began consideration of a Bill entitled “Cybercrime Prevention Act of 2003” (reportedly, the “science and technology committee” of the House of Representatives recently approved the proposed bill’s fifth draft, which IIPA has not seen). The Bill would impose penalties on hacking into a “computer system” or “computer network,” but also contains several provisions relevant to copyright protection. For example, the Bill would create in Section 6 a new violation and offense for anyone who, without the knowledge or consent of the owner thereof, willfully copies, reproduces, disseminates, distributes, or makes available online any protected works (defined as “works, including but not limited to computer programs, systems, and design, protected under Philippine laws”) by means of a computer system or network, for his or another person’s benefit, provided that the same is inconsistent with fair use as defined in the Copyright Act. While the definition of “protected works” appears to be independently and broadly defined in the Bill (i.e., it is not tied to the definition of copyright “works” in the Copyright Act), it must be confirmed that sound recordings (as well as all other copyright subject matter not explicitly mentioned) are included, preferably by expressly listing them as covered by Section 6.

The anti-hacking provisions include a prohibition on the unauthorized “access” to a computer or network (i.e., hacking), and a prohibition on “the use, production, sale, procurement, importation, distribution, or otherwise making available” of “devices ... designed or adapted primarily” to obtain unauthorized access to a computer or network, etc., as well as “computer passwords, access codes, or similar data by which the whole or any part of a computer system or network is capable of being accessed.” While we do not believe this was intended to apply to circumvention of access and copy controls protecting copyrighted works, as required under the WIPO “Internet” treaties, the WCT and WPPT, there may be minimal overlap. When the Philippines enacts its copyright law to provide protection against

circumvention of technological protection measures used by copyright owners in the digital environment, much of the skeleton for those provisions can be taken from the Cybercrime Bill.

Finally, the Cybercrime Bill provides a mechanism to ensure service providers will cooperate with right holders trying to enforce their rights by having them turn over, in the case of a warrant or order from a competent court, records of users who are suspected of breaching the law (including Section 6 on IPR). The Cybercrime Bill might, if enacted, complement the provisions of the Electronic Commerce Act (2000),²⁹ which criminalizes acts of copyright piracy carried out “through the use of telecommunications networks, such as, but not limited to, the Internet” [Section 33(b)].³⁰ That Act contains one 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 preserves the ability of courts to enjoin service providers from continuing to allow infringing uses on their networks. The Cybercrime Bill will provide added assurance that service providers will cooperate with copyright owners attempting to protect their rights in the online environment.

...But Philippine Government Is No Closer to Passage of Modern Copyright Law

IIPA has been advocating for several years the passage of Senate Bill 1704 and House Bill 3182,³¹ which would bring the law of the Philippines up to modern standards, including full implementation of the WCT and WPPT (which the Philippines acceded to on October 4, 2002). IPO Director Emma Francisco’s position has been that the WCT and WPPT are self-executing in the Philippines, but the Philippines would greatly benefit by revision of its copyright law to meet the standards of the treaties, since the treaties are not drafted with sufficient specificity to substitute for a national legal instrument.

IIPA is also concerned about a Bill introduced in mid-2003 by Senator Panfilo M. Lacson introduced a called “An Act Providing Mechanism in Compulsorily Reproducing Unavailable Prescribed Books and Printed Materials for School and University and for Other Purposes.” This Bill, if enacted, would place the Philippines in violation of its obligations under the Berne Convention and the TRIPS Agreement, as it essentially proposes compulsory licenses for photocopying of textbooks and reading materials in cases where the books are not available within 30 days after the commencement of academic classes.³²

²⁹ Republic Act No. 8792 (2000).

³⁰ Section 33(b) establishes a minimum penalty for violations that includes both a mandatory six-month jail term and a minimum fine of P100,000 (approximately US\$1,789).

³¹ 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>.

³² There is a long history of compulsory licensing of books in the Philippines, dating back at least to 1973. Presidential Decree No. 285 of 1973 violated national treatment (Philippine authors got a higher royalty rate than foreign authors) and the “Appendix” of the Berne Convention. Various subsequent Decrees attempted to narrow the compulsory reprint license, but never met the minimum standards in the Berne Convention. In 1997, the government finally recognized that its Decrees violated its international obligations and they were finally repealed. However, even though the Decrees were revoked, reprint piracy remains a major concern for publishers in the Philippines, causing millions of dollars in losses every year to legitimate right holders. The Philippine government also continued, and continues even today, to acquiesce in the so-called “sell-off” of unauthorized reprints (undoubtedly all newly published books, in violation of current Philippine copyright law) even though it is now six years after the reprint license provision was revoked. The Lacson Bill fails to meet the requirements of the Berne “Appendix” and TRIPS, for example:

- The Berne Appendix provides that a license can only be granted by a government only after the passage of five years following the date of first publication of the book in the foreign country or origin (three years in the case of “works of the natural and physical sciences, including mathematics, and ... technology”; seven years in the case

Generalized System of Preferences

The Philippines currently participates in the U.S. GSP program, offering duty-free imports of certain products into the U.S. from developing countries. In order to qualify for such unilaterally granted trade preferences, USTR must be satisfied that the Philippines meet certain discretionary criteria, including whether it provides “adequate and effective protection of intellectual property rights.” In 2002, over \$707.7 million worth of Philippine goods were imported into the U.S. duty-free, accounting for a substantial 6.45% of its total imports to the U.S. For the first 11 months of 2003, more than \$824.8 million worth of Philippine goods entered the U.S. duty-free under the GSP program, accounting for a substantial 8.86% of its total imports into the U.S. The Philippines should not continue to expect such favorable treatment at this level when it fails to meet the discretionary criteria in this U.S. law.

of “works of fiction, poetry, drama and music, and ... art books”). The Bill does not contain these time periods, but would permit compulsory reproduction at any time “thirty (30) days from the official start of classes” if materials/books are “unavailable,” even where the book has just been published abroad.

- The Berne Appendix contains requirements that a license first be sought from the right holder and provides time periods within which the right holder can then bring the book into the Philippine market. The Bill contains no such safeguards.
- The Berne Appendix has many safeguards to ensure that the rights of the legitimate publisher of the book are protected, e.g., as soon as the book in question is distributed with authorization of the right holder, the license would terminate. The Bill contains no similar safeguards.

There are many other technical requirements in the Berne Appendix, contained in Articles III-IV of the Berne Appendix. It would be most unfortunate for the Philippines to continue consideration of a Bill that would so squarely fall outside of its international obligations.