

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2005 SPECIAL 301 REPORT

PHILIPPINES

EXECUTIVE SUMMARY

Special 301 Recommendation: The Philippines should remain on the Priority Watch List, but an out-of-cycle review should be conducted in 2005 to evaluate whether the actions listed below have been taken and, if so, consideration should be given to moving the Philippines to the Watch List. Recent actions taken by the Philippines with regard to piracy in some sectors, including the issuance of the Implementing Rules and Regulations for the Optical Media Act, are recognized as potentially important steps for improving copyright protection in the Philippines. Implementation of these IRRs in practice is vital, with adequate resources devoted by the government of the Philippines to eradicate optical disc piracy. Positive actions in the coming months can be considered favorably in the out-of-cycle review, especially if combined with effective action against piracy in other sectors and settings, such as illegal photocopying of books, end user piracy of business software, and piracy of videogames in Internet cafés.

Overview of Key Achievements/Problems: Several signs emerged in late 2004 and in January 2005 that the Philippines had taken steps that, if sustained and expanded, will hopefully eradicate optical disc piracy from its shores. These include the single largest seizure of optical discs (over US\$8 million worth of pirated discs) occurring in December 2004. The Optical Media Act (OMA) provides the Optical Media Board (OMB) with the authority to eradicate unauthorized production of optical discs. The Implementing Rules and Regulations (IRRs), which were just issued in January 2005, must now be fully enforced with adequate resources devoted to eradicate optical disc piracy in the Philippines. The Congress must adequately fund the OMB and devote sufficient resources to wipe out piracy in the Philippines. IIPA supports the OMB's effort to complete the eradication of optical disc piracy, including cutting off imports from Malaysia, Thailand, China, Hong Kong, and Taiwan, which still harm the domestic market. Despite these achievements, serious problems remain in the Philippines. Book piracy, principally in the form of rampant illegal commercial photocopying, continues to plague the publishing industry. Broadcast piracy, end-user piracy of business software, and piracy occurring on the Internet (including in Internet cafés, where the majority of entertainment software used is illegal) deal serious harm to copyright owners. The government continues to experience difficulties finding the right balance in establishing coordinating roles for various agencies, leaving enforcement efforts to suffer for much of 2004. 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. Estimated losses to the U.S. copyright industries in 2004 due to copyright piracy in the Philippines were US\$139 million.

Actions to be Taken in 2005:

- Continue sustained enforcement raids against pirate optical disc production facilities, seizing and destroying, dismantling and impounding illegal goods and equipment.
- Shore up flood of imports of pirated optical discs being smuggled into the Philippines (training and closer liaison with the Bureau of Customs and Philippine Postal Service is key).
- Identify and act against storage centers of pirated product and retail outlets engaged in piracy, whether reproduction, distribution, burn to order, etc.
- Raid pirate book reprint facilities and photocopy shops, cable pirates, and businesses or Internet cafés using unauthorized software.
- Identify syndicates responsible for supply of the local pirate market, whether based in the Philippines or abroad.
- Increase detection of illegal activities, whether coming into the Philippines, or already present, including copyright infringement, tax evasion, fraudulent declarations, and other illegal activities.
- Monitor progress toward prosecutions in order to deter piracy effectively and to clear backlogs of investigations and court cases.
- Ensure that expert judges handle copyright cases (consider reinstating a specialized IP court).
- Ensure that the new “Optical Media Board” (OMB) is fully funded by the Congress and that the new OD law is implemented aggressively.
- Designate a particular government agency or body to tackle the book piracy problem.
- Pass draft copyright law amendments (S.B. 1704 and H.B. 3182) to implement the WIPO “Internet” treaties fully, and pass cybercrime legislation with coverage of all copyrighted materials.
- Formally 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.

For more details on Philippine’s Special 301 history, see IIPA “History” Appendix to this filing at <http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years’ reports on the Philippines at <http://www.iipa.com/countryreports.html>.

PHILIPPINES
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2000-2004¹

INDUSTRY	2004		2003		2002		2001		2000	
	Loss	Level								
Motion Pictures	33.0	85%	33.0	89%	30.0	80%	28.0	80%	25.0	70%
Records & Music ²	20.0	40%	22.2	40%	20.9	40%	23.9	36%	1.4	33%
Business Software ³	38.0	70%	33.0	72%	25.0	68%	19.9	63%	21.8	61%
Entertainment Software ⁴	NA	90%	NA	95%	NA	NA	NA	99%	41.0	98%
Books	48.0	NA	45.0	NA	45.0	NA	44.0	NA	44.0	NA
TOTALS	139.0		133.2		120.9		115.8		133.2	

COPYRIGHT PIRACY

Piratical Imports of Optical Media Harm the Philippine Retail Market

Imports of pirated optical discs 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) from Southeast Asia, e.g., Malaysia,⁵ Indonesia (increasing dramatically in 2004), Thailand, China, Hong Kong, and Taiwan,⁶ continue to harm the local market in the Philippines for copyrighted materials. The prices of piratical product are so low as to ruin the legitimate market.⁷ Exacerbating the problem was a lull in enforcement in 2004 due to the transition between the dismantling of the Videogram Regulatory Board (VRB) and the establishment of the Optical

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission, and is available on the IIPA website at www.iipa.com/pdf/2005spec301methodology.pdf.

² 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.

³ BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in the Philippines, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at <http://www.bsa.org/globalstudy/>). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$55 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

⁴ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

⁵ Optical Media Board (OMB) Chair Edu Manzano has stated that upwards of 85% of pirated materials, mostly pirate DVDs, coming into the country come from Malaysia. See Marinal R. Cruz, *OMB chief says fewer pirated DVDS sourced from Malaysia*, Inquirer News Service, July 19, 2004

⁶ The motion picture industry reports that most pirate movies have traditionally come from China, Taiwan and in particular Malaysia, but that in 2004, there was a definite increase in pirate DVDs being imported from Indonesia, particularly through Davao.

⁷ Pirated VCDs and DVDs were being sold for 25 to 70 pesos (US\$0.45 to \$1.25) apiece and are rented out for a mere 5 pesos (9 cents). See Luz Baquioro, *Copyright Piracy Decimates the Domestic Market in the Philippines*, August 24, 2004, at http://straitstimes.asia1.com.sg/asia/story/0_4386_268780_00.html (reporting that legitimate Manila video shops have had to resort to slashing prices to fight piracy, noting that piracy has forced scores of video stores to fold in recent years; legitimate rental prices have fallen to 15 pesos – US\$0.27 for a VCD and 30 pesos – US\$0.54 for a DVD. Retail prices of VCDs start at 95 pesos – US\$1.70, while those for DVDs range from 395 to 700 pesos – US\$7.20 to 12.75). It is also reported that a pirate copy of Adobe Acrobat sells for 80 pesos (US\$1.45).

Media Board (OMB).⁸ Low prices of hardware for playing discs including DVDs (roughly US\$53), imported primarily from China and Taiwan, further encourage piracy. Pirate “burned” CD-Rs appeared in larger numbers in 2004, many of which were “burned to order” by small retail shops or otherwise produced in the Philippines.

Book Piracy in the Philippines Remains a Serious Concern

Book piracy in the Philippines is endemic, including illegal photocopying of entire books, pirate offset printing, and increasingly, books “burned” on CD-R. Primary targets include university textbooks, technical books, and professional medical books. Photocopying takes place most often in commercial establishments surrounding universities or in street stalls concentrated on a single street or small group of streets.⁹ Photocopy shops also operate on campuses and in hospitals and medical and nursing schools, often in highly organized fashion, selling door to door to doctors’ offices and medical establishments. These shops avoid stockpiles of infringing goods by copying on a “print to order” basis, complicating investigations and enforcement actions.¹⁰

On the print piracy side, the now-defunct Presidential Decree No. 1203 continues to present some minimal difficulty (with pirates reprinting books claiming this exemption, which was repealed in 1997), but action by the Intellectual Property Office has helped to diminish the effect of this phenomenon, at least in Metro Manila. The Intellectual Property Office is to be commended for its efforts in this regard, and IIPA encourages further monitoring to ensure that bookstore shelves stay clear of these illegal editions. IIPA also believes that the Philippine government must stand ready to take raids against booksellers or printers who continue to abuse this provision.

Books burned on CD-R can be found in street stalls all over Metro Manila, and even in some shopping malls. Pirates burn hundreds of reference titles or textbooks in professional fields and technical fields onto a single CD and sell the CD for about US\$1.00. Popular fiction and non-fiction books are available as well. These CDs are generally available in retail stores in malls or in the same stalls selling illegal photocopies. Again, IIPA requests that the Philippine government designate a government agency to coordinate action against all of these forms of book piracy and take assertive enforcement measures in the next few months.

Broadcast Piracy Further Threatens Audiovisual Market

The motion picture industry suffers from the unauthorized transmission of motion pictures on hundreds of cable systems in the country, damaging the legitimate theatrical and video markets. Although cable systems outside Manila are regulated, there was still a proliferation of infringing transmissions in 2004, including transmissions of newly-released

⁸ *Id.* Mr. Joey Singian, the General Manager of VideoCity, a major video store, noted, “For a few months, piracy was not addressed as much as it used to be and pirates took advantage of that.” Mr. Rhiz de Leon, chief operations officer of ACA Franchise Group, which owns video chain ACA Video, noted that while raids in the Muslim Barter Trade Centre in downtown Manila or in the capital’s swank Greenhills district often hit the headlines, “... the vendors usually reopen a couple of hours after the raids ... it is a never ending problem.”

⁹ The “university belt” in Metro Manila is especially well known, and publishers have discovered that most cities contain a street rife with photocopy shops. An example would be Lower Bonifacio Street in Baguio City, a university town in the Province of Benguet, north of Manila.

¹⁰ For example, a market survey was conducted in late 2004 in Baguio, in which it was discovered that most photocopy centers outside the university do not have entire photocopied editions available for ready sale but will photocopy on demand, although publishers found that a shop receiving an order for an entire book would sometimes make a few extra copies of it in anticipation of future orders.

motion pictures repeated several times a day. The National Telecommunications Commission (NTC) is supposed to monitor the operations of licensed and non-licensed cable TV operators, but other than issuing the occasional warning letter, NTC has been totally ineffective 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 have consistently insist that they have no jurisdiction over copyright violations or 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.

Another problem in the Philippines for the audiovisual sector is the continued theft of satellite signals of home entertainment channels.

Broadband Has Brought Internet Piracy to the Philippines

With the increased availability of broadband both in homes and Internet cafés in the Philippines in 2004, copyright owners have become increasingly concerned that illegal Internet downloads and Internet-based hard good sales of “burned” CD-Rs and DVD-Rs will become more of a threat to legitimate sales and distribution in the Philippines. Roughly 1,500 Internet cafés are in operation in the Philippines, and virtually all of these establishments profit from unauthorized exploitation of the most popular entertainment software titles.

Optical Disc Production: Number of Plants Increased in 2004

In addition to the problem of mass importation of pirate discs into the Philippines, IIPA remains concerned about optical disc overproduction in the Philippines, as optical disc plants continue to migrate to the Philippines in increasing numbers. International groups from Malaysia, Macau and Indonesia are suspected of having local investments in these operations. Through the implementation of the Optical Media Act, which has yet to occur, it is expected that the Optical Media Board (OMB) will provide detailed and accurate statistics on the number of plants and lines operating in the country. Without those, IIPA guesses that there were at the end of 2004 as many as 16 optical disc factories in the Philippines, and reported the existence of 26 production lines in 2004, with an estimated overall production capacity of 91 million discs per year.¹¹ IIPA believes covert production facilities, often protected by law enforcement and local government officials, remain in existence both in remote areas of Luzon and within the major cities.

IIPA’s concern expressed in the 2004 report that production would shift to pirate DVD appears to have become a reality in 2004. IIPA understands that a number of licenses for DVD replication were knowingly issued by associated officials within the then Video Regulatory Board at the beginning of 2004, when the OMB was in a state of flux. Most of the new “licensed” facilities have not yet begun production, but it is clear that the Philippines will have a significant export problem if these plants are not examined to ensure they are legal.

Finally, “burning” content onto CD-Rs (and to a lesser extent DVD-Rs) became more prevalent in 2004. The increase in CD-R piracy can be attributed in part to the low costs of

¹¹ The Optical Media Board reportedly knows of 11 lines in operation, but may not have a grasp on the true total, since the OD Implementing Regulations were just passed and the OMB does not plan to start issuing production licenses until early 2005.

producing CD-R pirate product and the fact that the retailers are involved in home production. The problem is most severe in Manila, but has spread to the provinces as well, mainly Cebu.

End-User Piracy Harms Software Right Holders

End-user software piracy remains the most serious threat to the business software industry in the Philippines. Although the National Bureau of Investigations (NBI) has conducted many successful end user actions on behalf of the Business Software Alliance, they have sometimes run into difficulties.¹² In one case in September 2004, in a case involving a reseller loading computer hard discs with unlicensed software, the Supreme Court issued a favorable decision in denying a motion to quash a warrant, clarifying two important points concerning the validity of search warrants. Specifically, the court found that there was probable cause to issue/carry out a search warrant in an end user case based on witness testimony, and that the warrant, while not successful as a “general warrant,” was severable, and therefore, while defective, could survive challenge.¹³ The software industry views this decision as precedent-setting and a major victory, in that it will benefit other right holders fighting warrant quashal motions.

COPYRIGHT ENFORCEMENT IN THE PHILIPPINES

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2004 PHILIPPINES			
ACTIONS	MOTION PICTURES	BUSINESS SOFTWARE	BOOKS
NUMBER OF RAIDS CONDUCTED	524	1	10
NUMBER OF VCDs SEIZED	1,293,181	0	500
NUMBER OF DVDs SEIZED	404,283	0	0
NUMBER OF CD-Rs SEIZED		0	125
NUMBER OF INVESTIGATIONS	777	1	
NUMBER OF VCD LAB/FACTORY RAIDS		0	2
NUMBER OF CASES COMMENCED BY NBI		1	
NUMBER OF CASES COMMENCED BY POLICE	107	0	
NUMBER OF INDICTMENTS		0	0
NUMBER OF DEFENDANTS CONVICTED (INCLUDING GUILTY PLEAS)		0	0
ACQUITTALS AND DISMISSALS		0	0
NUMBER OF CASES PENDING		8	0
NUMBER OF FACTORY CASES PENDING		0	0
TOTAL NUMBER OF CASES RESULTING IN JAIL TIME		0	0
SUSPENDED PRISON TERMS			0
MAXIMUM 6 MONTHS		0	0
OVER 6 MONTHS		0	0
OVER 1 YEAR		0	0

¹² In one end user raid in March 2004 against a call center based inside Clark Special Economic Zone (CSEZ), managed by Clark Development Corporation (CDC), CDC apparently did not permit the National Bureau of Investigation (NBI) officers from taking seized computers out of the CSEZ and, as such, a sample of the computers using infringing software were placed in the offices of the CDC. Subsequently, the search warrant was quashed, in part because they were not duly executed and no criminal action had been filed.

¹³ See *Microsoft Corp. v. Maxicorp, Inc.* (G.R. No. 140946). Specifically, the court noted that a partial defect in a search warrant does not render the entire search warrant invalid. According to the Supreme Court, no provision of law exists to nullify the entire warrant. A partially defective warrant remains valid as to the items specifically described in the warrant. A search warrant is severable and the items not sufficiently described may be cut off without destroying the whole warrant.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2004 PHILIPPINES			
ACTIONS	MOTION PICTURES	BUSINESS SOFTWARE	BOOKS
TOTAL SUSPENDED PRISON TERMS			0
PRISON TERMS SERVED (NOT SUSPENDED)		0	0
MAXIMUM 6 MONTHS		0	0
OVER 6 MONTHS		0	0
OVER 1 YEAR		0	0
TOTAL PRISON TERMS SERVED (NOT SUSPENDED)		0	0
NUMBER OF CASES RESULTING IN CRIMINAL FINES			0
UP TO \$1,000		0	0
\$1,000 TO \$5,000		0	0
OVER \$5,000		0	0
TOTAL AMOUNT OF FINES LEVIED (IN US\$)		0	0

Some Steps Taken to Eradicate Pirate Imports, But Problem Remains Severe

Perhaps one of the most severe problems facing the Philippines today is the Government's apparent inability to prevent massive smuggling of piratical imports at the borders.¹⁴ Even government officials recognize that cracking the piratical importation problem will be a serious challenge.¹⁵ The administrative structure within the government has also proved to be somewhat cumbersome. Customs Administrative Order No. 6-2002 (September 23, 2002) implemented Customs-related provisions of the TRIPS Agreement (Articles 51-60), and expressly provided that a good "which constitutes a piratical copy or likeness of any work, whether published or unpublished on which copyright subsists" may not be imported into the Philippines. By virtue of the Order, an "Intellectual Property Unit" within the Bureau of Customs (BOC) was supposed to have been formed, but as of January 2005, BOC was still in the process of submitting to the Philippine Department of Finance a work plan for the Unit. In the meantime, the Commissioner of Customs established an interim intellectual property unit with the following interim functions:

- To handle all applications for recording intellectual property rights and product or products covered therein.
- To receive requests for "issuance of alert" or "hold orders" addressed to the Commissioner of Customs, and to record similar requests addressed to the District Collector of Customs in ports outside of Manila.
- To investigate and, in case of seizure, prosecute intellectual property rights violations in the appropriate forfeiture proceedings.
- To gather and manage data relating to intellectual property enforcement and run, in coordination with the BOC's Management Information Systems and Technology Group, the intellectual property database.

¹⁴ Larger shipments are of great concern, but many shipments into the Philippines come in "tubes" or stacks of 50-60 discs, through airports and piers.

¹⁵ Government officials have cited corruption in Customs, leaks in enforcement (leaks to raid suspects, etc.) as ongoing difficulties with enforcement at the border.

- To coordinate all BOC activities relating to IPR matters; and to draw up, in coordination with the BOC's Human Resource Management Division, an appropriate training program on intellectual property rights border control enforcement.
- To act as the liaison office of the BOC for the IPO and other agencies of government control with intellectual property enforcement.

The BOC is also required¹⁶ 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 various Orders 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. These Orders must be fully implemented as soon as possible.

Notwithstanding the lack of a firm administrative structure, the BOC has begun to conduct some seizures at the airport (international airport in Manila) and major seaports.¹⁷ Yet, pirate product continues to enter the country in significant quantities (some reportedly with the collusion of officials). One positive development is that OMB has claimed to have created a "choke point" through which product cannot be imported, including from Malaysia (it is estimated that 85% of all pirated materials coming into the Philippines come from Malaysia).¹⁸ Time will tell whether, in 2005, the OMB working with BOC can tackle what is now the most serious piracy issue facing the Philippines.

Some Steps Taken to Tackle Retail Piracy, Book Piracy, But...

Philippine authorities continued to take hundreds of actions against downstream activity, namely, pirate optical disc distribution and retail activity; however, the replacement of the VRB by the OMB resulted in a drop-off in activity in 2004.¹⁹ The raids by OMB were largely non-deterrent, as stores closed due to raids often reopened the following day; over 500,000 optical discs were seized in raids during October alone (and as noted below, OMB carried out a huge bust in December), but while these raids are clearly evidence of OMB's successes in 2004 fighting piracy, unfortunately these statistics also indicate the massive scope of the piracy

¹⁶ Under Customs Administrative Order No. 19-2003 dated 12 September 2003, pursuant to Customs Administrative Order No. 6-2002, Section II-E.

¹⁷ In one joint action by OMB and industry representatives, a Merpati Airlines (Indonesia) flight from Manado, Indonesia to Davao City in the Philippines was intercepted. Two male passengers, both Philippine nationals, were arrested by Customs Police and charged with smuggling offenses for transporting over 8,000 optical discs, labels and packaging in their check-in luggage. It is suspected that local authorities were involved in the illicit trade, which is why enforcement agents from outside Davao were brought in. An inspection of the suspects' passports revealed that one of the men had made 16 recent journeys between Manado and Davao City. Initial inspection of the discs indicated that they were manufactured in Indonesia both for local sale and for export to Manila. The seizure represented over US\$160,000 in value; the product in this case would normally be destroyed following legal proceedings.

¹⁸ See Marinal R. Cruz, *OMB chief says fewer pirated DVDS sourced from Malaysia*, Inquirer News Service, July 19, 2004 (in which OMB Chair Edu Manzano noted, "They are now having a hard time bringing in (bootleg) DVDs ... [i]n fact, some people I know have been complaining they are now unable to buy DVD copies of *Spider Man 2* and *Shrek 2*. Manzano also noted that pirates are increasingly attempting to smuggle bootleg materials into the country through Singapore and Hong Kong, "[b]ut the OMB now has access to information that enables us to be on site when these smuggled goods arrive").

¹⁹ Examples of raids in 2004 included the following: OMB Chief Edu Manzano led raids on two malls in Parañaque and Makati on July 17, 2004, based on industry information, yielding about 100 sacks of pirated materials. Pirated discs were also seized in actions at Subic Bay port in early July 2004.

problem. Nonetheless, IIPA is heartened by the statements and actions from OMB indicating its resolve to solve the piracy problem — namely, that it will not stop until piracy is eradicated.²⁰ Seizures of pirated optical disc in 2004 increased significantly compared to previous years, as some two million units were seized.

There are several notorious malls in the Philippines engaged in unrelenting retail piracy. One is in the upscale “Virra Mall” in Greenhills, San Juan, which is owned by the Ortigas Co. & Limited Partnerships. It has taken years to make headway into shutting down piracy operations in malls such as Virra, but finally, in August/September, raiding began. According to an article in October 2004 in the *Manila Times*, an announcement was made that Virra Mall Shopping Center would “undergo a major facelift” (undoubtedly with the proceeds from piracy), and the high profile Virra Mall closed at the end of 2004 (although reportedly, stalls set up near the site of the mall continued to sell pirate product, particularly entertainment software and popular books burned on CD-Rs). While the reasons given were ostensibly due to a refit of the mall, considerable pressure was placed on the mall to stop piracy activities in the mall and in informal discussions the mall owners said there would be no more pirate sales allowed in the mall on reopening. It is hoped that this is in fact the case.²¹ Other legal pressures are apparently also being applied against the Ortigas group. Naturally, as a result of these actions, the pirates are migrating, and care must be taken to ensure they don’t obtain footholds in new malls.

The publishing industry received some support from the National Bureau of Investigation (NBI), resulting in several raids being carried out (e.g., in May 2004, two medical photocopy establishments were raided, resulting in criminal complaints; in July, twelve photocopy shop targets were raided in the Recto area of Manila). In addition, the Philippine government took some steps to discourage companies continuing to reprint and/or sell books under Presidential Decree 1203, which was rescinded in 1997. Several of those companies have reportedly now cleared their shelves of “1203” product — a very encouraging sign. IIPA commends the Intellectual Property Office (IPO) for this work and requests continued follow-up with the entities remaining on the list provided by the publishers.

... Little Done to Combat Pirate Production or End-User Piracy

As noted, the number of optical disc production facilities in 2004 increased, notwithstanding that several raids were conducted against replication factories.²² Further, the raids against replicators have not to date had a deterrent effect, as evidenced by one raid in November in which replicating equipment was seized for the second time.²³ Unfortunately, some production continues in an open and notorious manner, e.g., one of the main pirates

²⁰ OMB Chairman Edu Manzano has stated publicly that the OMB’s fight against pirates would continue until the pirates had been ‘eradicated.’

²¹ Anthony Vargas, *Virra Mall booting out movie, music pirates*, October 20, 2004, at http://www.manilatimes.net/national/2004/oct/20/_yehey/metro/20041020met11.html (in which Rex Drilon, Ortigas’ chief operating officer, is quoted as saying “Virra Mall would be renovated and reformed to rid the bad image that it had acquired in the past year” due to piracy of optical discs).

²² For example, one raid in August resulted in shutting down a licensed replicating facility, which at the time of the inspection was found to be producing unlicensed material; seized in the operation were 1,600 discs of infringing audio product, two replicating machines, an offset printing machine and 20 bags of polycarbonate. Nine stampers were also taken in for verification.

²³ On November 3, OMB officials, in cooperation with the MPA and National Bureau of Investigation, conducted simultaneous raids throughout Manila City, resulting in seizures of more than 30,000 optical discs estimated to be worth PHP7.5 million (around US\$136,600). The operation also resulted in the discovery replicating machines that were supposedly seized by the OMB during raids in 2001. The machines were found operating and in the possession of Optic Replicators, Inc., a licensed replicating plant.

“burning” content onto CD-Rs operates just one floor above the residence of the director of the NBI. Such open piracy should not be tolerated and IIPA hopes to hear that this situation has been resolved. Regarding end-user piracy of business software, only a couple of known criminal raids were conducted by the NBI in 2004, with no convictions in the courts.²⁴

Courts Backlogged, Processes Delayed, Marred by Problems, Including Issuance of Non-Deterrent Results

In 2004, courts made no real progress to bring about deterrent judicial enforcement against copyright piracy in the Philippines. There was one known conviction for copyright piracy, against a book supply owner who had been selling illegal photocopies of medical books at a medical convention. This individual was sentenced to one year imprisonment and a fine of 50,000 pesos (US\$911) for each of ten counts in violation of Section 174 of the Intellectual Property Code.²⁵ There are apparently cases against factories, but disappointingly, one criminal case brought against a factory was dismissed in 2004. In many cases, right holders have noted various problems, including loss of evidence, or irregularities regarding obtaining and executing search warrants, seizing evidence and related documents, and being able to preserve and use such evidence in judicial proceedings.

In 2004, it continues to be the case that most piracy cases are referred to regional prosecutors, who have little experience dealing with copyright cases (much less than the Department of Justice prosecutors). While the Department of Justice’s IP Task Force was reinstated in Metro Manila, this division is charged only with pre-raid and raid procedures. Post-raid, the prosecution of the case must take place in the defendant’s resident jurisdiction. Thus, if the raid is outside Metro Manila, the regional prosecutors must take the case because the IP Task Force has not been given enough resources to be able to be active outside Metro Manila. In addition, the DOJ has imposed filing fees for IPR violation complaints of 5,000 pesos (US\$91) per complaint.²⁶ Some right holders find this fee unfair, as it is much higher than fees for other types of criminal complaints.

In addition, 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.²⁷ 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.

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

²⁴ See, e.g., Erwin Lemuel G. Oliva, *Police raid local firms using pirated software*, INQ.net, July 14, 2004, at http://www.inq7.net/inf/2004/jul/15/text/inf_1-1-p.htm (describing another raid on several undisclosed local firms in Pasig and Mandaluyong allegedly using illegal software, reportedly resulting in seizures of about 5.5 million pesos’ (US\$100,200) worth of unlicensed engineering and architectural design software AutoCad. “These were large engineering and consulting firms,” added Sosa. More raids are expected to be conducted over the next few months, the police agent said.

²⁵ This case had been pending in the court system, with innumerable delays, for nearly four years.

²⁶ See Republic Act No. 9279 and its Implementing Rules and Regulations, or the Act Granting Additional Compensation in the Form of Special Allowance for Members of the National Prosecution Service and State Counsels of the DOJ and Department, Circular No. 42 dated September 14, 2004.

²⁷ In the meantime, witnesses move, evidence risks deterioration or loss, and defendants continue to operate at a profit.

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."²⁸ 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 three cases with the prosecutions department and 13 active criminal cases in court, including one case on appeal.

Enforcement Coordination and Responsibilities Remain Confused and Under-funded

A continuing source of problems in the Philippines is the disorganized approach to copyright enforcement.²⁹ For example, there are some ongoing "turf" battles which merely stifle enforcement energies and lead to confusion. IIPA has supported the Optical Media Act, the disbanding of the Video Regulatory Board (VRB), and the creation of a new Optical Media Board (OMB), with the understanding that the new organization would have the confidence of the government, the mandate, and the funding necessary to carry out anti-piracy activities effectively. Unfortunately, during 2004, the implementing regulations for the Optical Media Act formally giving the OMB the authority it needs were not issued (although they have been as of February 2005), and the OMB still has not been given the funding it needs (as the VRB had been given) to ensure ongoing effectiveness. Adequate funding by the Congress must be achieved as soon as possible, or the piracy situation in the Philippines threatens to spiral out of control.

Part and parcel of the turf battle mentioned is the question of what role the Intellectual Property Office (IPO) should play in intellectual property enforcement. After the 2004 election, discussion began to surround the question of which agency should coordinate IP enforcement, and the question of whether the move of IPO from the Office of the President (where it was placed in 2001 under Executive Order No. 39 of Oct. 6, 2001) back to the Department of Trade and Industry. The 2001 move was intended to bring about greater coordination of enforcement (as the Philippine National Police and the National Bureau of Investigation are both under the Office of the President). It is clear that the move did not have the intended effect.³⁰ The move back to DTI has been touted by President Gloria Macapagal-Arroyo as necessary to achieve "better coordination" in the government's efforts to combat rampant piracy particularly in video

²⁸ The Regional Trial Court, Branch 24 in Manila has also been designated as an additional Special Commercial Court.

²⁹ 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). *Intellectual property rights tie-up forged*, Business World, June 19, 2003. IP-REAP was 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. However, IIPA knows of no coordinating functions IP-REAP has taken up in 2004, remaining an organization in name only.

³⁰ But see Friena P. Guerrer, *IPO joins the National Law Enforcement Coordinating Committee (Nalecc)*, BusinessWorld 11, February 19, 2004.

and audio discs and computer software.³¹ IIPA considers these moves as principally window-dressing and as unnecessarily bureaucratic maneuvering; the fact remains that the IPO remains without funding and motivation.

IIPA believes that it is the OMB that must be properly authorized and funded, and that only then can a dedicated and centralized IPR intelligence unit within the OMB be established. Such a unit would coordinate contributions from the Bureau of Customs, National Bureau of Investigations, Anti Organised Crime Commission and OMB personnel, liaising with industry bodies to conduct proactive and reactive anti-piracy operations against key piracy problems in the Philippines — pirate importation of optical discs, pirate optical disc production (prerecorded and burned), pirate retail (including book piracy), cable piracy, end-user piracy, Internet piracy, etc.

Confusion also reigns as to the appropriate body charged with coordinating enforcement against book pirates and commercial photocopy operations. While IPO has been helpful on some fronts, they make it clear that they are not charged with enforcement. Despite industry requests, there has been no effort to move toward coordination of book piracy enforcement efforts. The NBI has been helpful in carrying out raids, but no agency has taken ownership of the issue and no OMB-type body exists for this type of coordination and action. The Philippine government should designate a particular agency responsible for this coordination effort.

Another area of confusion has arisen out of attempts to obtain enforcement against unauthorized broadcast of U.S. right holders' movies and television programming in the Philippines. Right holders had understood that the National Telecommunications Commission (NTC) had the authority to revoke licenses of those broadcasters engaged in unauthorized transmission of copyrighted content. However, NTC had continually informed right holders that IPO has such authority, sending right holders into a state of confusion as to how to enforce their rights. Earlier in 2004, right holders were finally informed by IPO's Emma Francisco that, as one of several "cost-cutting" measures, a new Information and Communications Technology Ministry would be formed by way of Executive Order, including the NTC, the Telecommunications Office and other Ministries, possibly even including the IPO. Only at that point will authority for complaints about broadcast piracy be placed squarely within NTC. IIPA has recently learned that NTC is now undertaking investigations to verify complaints initiated by right holders, and has even sent a number of cease and desist letters (copied to the respective complainants) to broadcasters found to be in contravention of the regulations issued by the NTC (following a Circular instructing NTC to handle such complaints). Despite assurances from the NTC in October 2004 that guidelines would be finished soon and published on its website, the guidelines remain in the draft stage. Some right holders who have filed complaints of infringement with the NTC have received no feedback and further enquiries are met with answers that the complaint has been lost. Accordingly, extensive follow-up is required from right holders; yet, there is neither a receipt nor a notification by the NTC that the complaint has been received or that any action has been taken. Meanwhile, infringements remain ongoing despite these specific complaints.

³¹ *IPO to return to DTI?*, BusinessWorld, August 5, 2004.

Campaign Launched in November 2004 to Fight Piracy, Highlight Harms of Piracy to Local Economy³²

In November 2004, the OMB launched a new campaign to fight piracy in the Philippines, also issuing a "state of the Philippines" report. In a press briefing, OMB Chairman Edu Manzano said piracy harms the local movie, video, and music industry tremendously (the Philippine film industry used to be vibrant, producing 240 films per year, but in 2004 that number has dropped to a mere 40 films per year), and deprives the Philippine economy of millions of pesos in legitimate revenues; he also indicated that because of piracy, the Philippine movie industry loses in excess of 3 billion pesos (US\$54.7 million) in income every year.³³ The press briefing followed a warning published in the papers directed at "bazaar organizers," saying that if 'they knowingly allow sale and distribution of pirated optical media then they may be held criminally liable for violations of the Optical Media Act and the Intellectual Property Code.'

This series of raids that accompanied these announcements culminated after two months with one of the largest raids ever carried out in the Philippines. On December 8, 2004, the OMB seized 635,000 pirated DVDs and VCDs in a raid on a Quiapo shopping mall/residential building notorious for the sale of pirated movies and music.³⁴ Reportedly, more than 1,000 sacks of discs were collected, with an estimated "street value" of 476,250,000 pesos (US\$8.7 million). Over 300 security officers from the Police Special Action Force and the SWAT Team supported the OMB team in the raid. Search and seizure warrants were served to the owners of the 80 stalls suspected to peddling pirated goods. Even locked stalls had their padlocks cut off with bolt croppers, grinding discs and acetylene torches and were swept clean of pirated goods. Most of the seized DVDs were a mix of new and old titles that forensic evidence indicates were manufactured in Malaysia. Tens of thousands of audio CDs and hardcore pornography were also seized. Three 8-wheel trucks overflowed with the confiscated discs, as well as televisions, DVD players and disc burners used in the manufacture and sale of the pirated discs, prompting the OMB to get additional vehicles to move the goods to the OMB headquarters.

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

³² Not insignificantly, the Philippine government appears to recognize the detrimental effect piracy has played in the development of the Philippine economy. A study by University of the Philippines School of Economics professor Ramon Clarete found a "high negative correlation" between investments in software development, and information technology (IT) in general, and estimates of intellectual property rights theft for the four years to December 2002. IT investment quadrupled in 2000 when the piracy rate posted a seven percentage-point decline to 70 percent in 1999, according to the study, which was released in September 2004. "Similarly, investments in 2001 climbed by 38.2 percent when piracy rates dropped by nine percentage points in 2000," Clarete's paper said. Data for the study was culled from the Philippine trade department's Board of Investments, as well as from the Business Software Alliance. See *Piracy robs software investments: study*, September 24, 2004, at [http://www.sunstar.com.ph/static/net/2004/09/24/piracy.robs.software.investments.study.\(11.45.a.m.\).html](http://www.sunstar.com.ph/static/net/2004/09/24/piracy.robs.software.investments.study.(11.45.a.m.).html).

³³ Manzano also indicated that from July to November, OMB had seized "more than a million pirated optical discs."

³⁴ See Manila Bulletin, December 19, 2004.

provision allowing up to 40% foreign investment in cable systems that do not produce their own programs or content.³⁵ 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 remained stalled in 2004.³⁶

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

COPYRIGHT LAW AND RELATED LEGISLATION

Implementing Regulations Issued in January 2005 Must Be Fully Enforced

In late January 2005, Implementing Rules and Regulations (IRRs) to the “Act Regulating Optical Media, Reorganizing for This Purpose the Videogram Regulatory Board, Providing Penalties Therefor, and for Other Purposes ” (February 9, 2004) were finally issued by the Philippine government. IIPA congratulates the Philippine Government for this action to provide the OMB with authority to enforce against piratical optical disc/magnetic media production.

The Act and Implementing Rules and Regulations (IRRs) should 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.³⁷ The law should immediately be employed by the Philippine government to eradicate unauthorized optical disc production there. While IIPA has not reviewed the IRRs as finally issued, the draft IRRs IIPA had reviewed achieved the following positive results:

- Covered the burning of content onto recordable discs such as CD-Rs and DVD-Rs.³⁸
- Confirmed that one must obtain a license as a “condition precedent” for the “release of any optical media, manufacturing equipment, parts and accessories, and materials intended for use in mastering and/or manufacturing optical media, from customs or economic zones exercising independent customs laws” [Title II, Rule 2, Section 4(b)].

³⁵ Other important provisions in the draft cable law include some loosening of advertising restrictions and stiffer penalties for cable piracy.

³⁶ IIPA also understands that the bill contains foreign investment restrictions for some copyright industry sectors.

³⁷ The Act also closely tracks the “Effective Practices Regarding Optical Disc Production” paper that was endorsed by Asia-Pacific Economic Cooperation (APEC) Ministers at the APEC Ministerial in Bangkok in late 2003.

³⁸ The term “duplication” is defined to include “burning,” and “optical media” is defined to include duplicated discs. Therefore, it appears that any person who engages in “burning” of content onto a recordable disc must register under Title II, Rule 1, Section 1(e) of the IRRs. It is also made a condition [in Title II, Rule 2, Section 7(g)] of an optical disc production license that a licensee “shall not engage in the . . . duplication . . . of any optical media containing intellectual property, except with authority or consent of the owner thereof, or his duly authorized representative.” This is helpful to ensure that a licensee that does engage in “burning” of content onto a recordable disc on the side is bound by the license not to breach intellectual property rights.

- Made the “offenses” from the Optical Media Act administrative offenses as well, and therefore subject to administrative closure and the imposition of administrative fines.
- Clarified that certain activities (not expressly covered in the Optical Media Act), e.g., to “deface, remove, erase, [or] obliterate” SID Code from an optical disc, are to be punished through administrative sanctions. The IRRs also made some important adjustments to ensure that wrongful activities are covered under the statutory scheme (e.g., the IRRs clarify that producing discs in a location other than that endorsed on the license is included in the offense of “engaging in the . . . [illegal] activity without the necessary registration or license”).

A number of concerns remained in the draft IRRs that IIPA had reviewed previously, as outlined below.

- **Definitions of “Manufacture” and “Optical Media” Must Expressly Include Blank Media:** An effective optical disc law must require licensing of the production of all types of “optical media,” whether filled with content, blank, or recordable. The coverage in the draft IRRs was ambiguous, since the definitions of “manufacture” and “optical media” in the Act as well as in the draft IRRs refer to content being stored (“manufacture” means “the act or business of producing optical media or devices containing sounds and/or images, or software code . . .”; “optical media” means “a storage medium or device in which information, including sounds and or images or software code, has been stored”). The definition of “optical media” refers to “Schedule C,” however, which includes blank recordable media, so the question remains whether one needs a license to produce blank or recordable media.³⁹ The addition of the phrase “or capable of containing” to the definition of “manufacture” (after the word “devices”),⁴⁰ and the phrase “or is capable of being stored” to the definition of “optical media” (after the phrase “has been stored”),⁴¹ would resolve these ambiguities.
- **Informational Requirements for Licenses Should be Set Forth in Detail:** While the Optical Media Act sets forth the license requirements, it does not address the minimum informational requirements for: an application for a license to produce optical discs; the license document; an application for importation, exportation, acquisition, sale or distribution of optical media, or for the mastering, manufacture or replication of optical media (Section 13); an application for importation, exportation, acquisition, sale, distribution, possession or operation of manufacturing equipment, parts and accessories used or intended for use in the mastering, manufacture or replication of optical media (Section 13); or an application for the importation, exportation, acquisition, sale, distribution or possession of manufacturing materials used or intended to be used for the mastering, manufacture or replication of optical media (Section 13). It is essential that these omissions be dealt with since, for

³⁹ Schedule C includes “CD-R” but does not, for example, include “DVD-R” and “DVD-RW.” IIPA proposes changes in the draft IRRs to include these media as well as those currently listed.

⁴⁰ The new definition would read (emphasis added to additional language):

Manufacture – the act or business of producing optical media or devices containing **or capable of containing** sounds and/or images, or software code, including any work protected in Part IV of the IP Code, by mastering and/or replication. In relation to equipment, “manufacture” shall refer to the assembly or integration of various components into any equipment useful for the mastering, manufacture and/or replication of optical media.

⁴¹ The new definition would read (emphasis added to additional language):

Optical Media – a storage medium or device in which information, including sounds and or images or software code, has been stored **or is capable of being stored**, either by mastering and/or replication or duplication, which may be accessed and read using a lens scanning mechanism employing a high intensity light source such as laser or any such other means as may be developed in the future. The term shall include, but not be limited to those listed in Schedule C.

example, the question of whether a license should be issued or renewed depends on the information required [for example, under Title II, Rule 3, Section 1(a) of the draft IRRs].

- **Record-Keeping Requirements Should be Set Forth in Detail:** Section 7(b) of Title II, Rule 2 of the draft IRRs provided for records to be kept by a licensee for five years, which included records involving “all activities” of the plant as well as “samples of media” as required by the OMB. This provision would be strengthened by a more elaborate list of the kinds of records that must be kept.
- **Licensees Should be Required to Verify Rights to Qualify for “Good-Faith” Defense When Rendering Service of Replicating Discs:** Section 19(b)(2) of the Optical Media Act contains a “good faith” defense to a licensee that “renders the service [of duplication, mastering, manufacture or replication of optical media] to any person, in respect of any intellectual property, who does not have the consent by the owner of the intellectual property or his representatives or assigns.” Namely, the licensee can avail itself of the defense and therefore apparently escape liability entirely if he/she “notifies the OMB in writing of such transaction within five (5) working days from receipt of the job order, furnishing to the OMB all material information thereof.” Title IV, Rule 1, Section 1(d) of the draft IRRs deemed that anyone “who, being licensed to engage in the duplication, mastering, manufacture or replication of optical media, knowingly renders the service to any person, in respect of any intellectual property, who does not have the consent by the owner of the intellectual property or his representatives or assigns” commits an administrative offense. However, the good faith defense from Section 19(b)(2) of the Act is repeated practically verbatim. In order to qualify for the defense, the onus should be on the licensee to prove that it has the rights to engage in the activities undertaken. The IRRs should set forth requirements to “verify” rights in order to qualify for the defense and the particulars of kinds of information that should be provided. These requirements should be adopted by the Philippine government to close a potentially gaping loophole in the law. These requirements should apply both to the administrative offense set out in Section 1(d) of Title IV, Rule 1 of the draft IRRs, but also should be made applicable to Section 19(b)(2) of the Act.
- **Definition of “Manufacturing Material” Should be Broadened and Made Technology-Neutral:** The definition of “manufacturing material” is too technology-specific, and thereby may be overly narrow or become obsolete. The current definition covers materials that are “suitable for” the manufacture of optical discs, and in the Schedule defines “suitability” as “a melt flow index (MFI) which shall be determined by the OMB,” and initially defines a suitable substance as one that has a “melt flow index” of “not less than 45 grams per ten (10) minutes at 300 degrees Celsius and 1.2 kilogram.” This definition is unnecessarily technology-specific, should be deleted, and the words “capable of being used to manufacture optical discs” should be substituted in place of “suitable for the manufacture of optical discs.”⁴²

⁴² There are already numerous examples of manufacturing materials, like SANDS, and some new technologies (like blue ray technology) that would make the current definition of “manufacturing material” in the IRRs obsolete. See, e.g., Richard Shim and Matt Loney, *Sony develops 25GB paper disc*, <http://news.zdnet.co.uk/0,39020330,39152273,00.htm>. Therefore, the language at the end of the definition, “Suitability shall be measured by a melt flow index (MFI) which shall be determined by the OMB. Unless otherwise determined, polycarbonate or polycarbonate substitutes with MFI of not less than 45 grams per ten (10) minutes at 300 degrees Celsius and 1.2 kilogram shall be considered as suitable as manufacturing material, for purposes of these Rules,” should be deleted.

- **Dual System of Registrations and Licenses Creates Some Inconsistencies:** The Optical Media Act requires those who engage in certain activities to “register with, and secure the appropriate licenses from the OMB.” The draft IRRs confirmed that a dual system for registration and licensure would be established, and it appears that this may create some inconsistencies. For example, the length of “registration” is potentially unlimited (lasting “as long as the registrant shall apply for” and “continue to renew”), with lapse only possible one year after failure to renew. Licenses are valid for “three years” and are renewable.
- **Grounds for Suspension Should be Broader than Grounds for “Cancellation”:** The draft IRRs did not appear to distinguish between “suspension” and cancellation in Title II, Rule 4 (indeed, they appear to reproduce entirely the provision from the Optical Media Act, Section 16). The IRRs should be slightly amended to distinguish between “suspension” which should occur when there is a reasonable suspicion that a breach of the license or an offense has been committed, and “cancellation” which can be a stricter standard (i.e., cancellation might be warranted only upon a final conviction or upon a finding by the competent authority that an administrative offense occurred). The reasoning behind this distinction is that “suspension” is intended to stop all suspected illegal activity until it can be determined that the license should be cancelled or reinstated (if no illegal activity is finally found). The current section of the IRRs makes no distinction (especially Section 1(b) through (d) should provide for some leeway for “suspension” when any of the conditions in those subparagraphs is suspected of being present).

We note finally that the Act and IRRs need to be implemented in a GATT-compatible way. For example, any licenses with respect to the importation of optical media, etc. must be automatic.

IIPA Lauds Introduction of “Act Amending Certain Provisions Of Republic Act No. 8293” (Copyright Act)

In November 2004, Congressman Joey Sarte Salceda introduced Bill No. 3308, “An Act Amending Certain Provisions of Republic Act No. 8293 Entitled ‘An Act Prescribing the Intellectual Property Code and Establishing the Intellectual Property Office, Providing For Its Powers and Functions and For Other Purposes’” into the Philippine House of Representatives. This Bill, if finally passed, would make the Philippines’ copyright law one of the most modern in the world. The Bill would, among positive achievements, fully implement of the WCT and WPPT (which the Philippines acceded to on October 4, 2002). IIPA strongly supports swift passage of Bill 3308. Similar measures should be considered for photocopy shops in and around universities.

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),⁴³ 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)].⁴⁴ 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.

IIPA Lauds DTI Purisima's Directive to Landlords

IIPA understands that in December 2004, Department of Trade and Industry (DTI) Secretary Cesar A. V. Purisima ordered mall owners to include a clause in lessees' contracts requiring them to prohibit the sale of pirated copies of copyrighted product on their premises, and to impose penalties on violators. Apparently "SM Supermalls" and "Greenhills Shopping Center" (where the notorious Virra Mall is located) have both vowed to abide by the directive. This kind of directive, which can pave the way for imposing liability on pirates as well as placing responsibility on landlords for their tenants' actions, is a highly laudable step, and IIPA looks forward to seeing how this directive will be carried out in 2005 against any malls/landlords that choose to ignore it.

⁴³ Republic Act. No. 8792 (2000).

⁴⁴ 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).

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 2003, \$894.7 million worth of Philippine goods were imported to the United States duty-free under the GSP program, accounting for 8.9% of its total imports to the U.S. For the first 11 months of 2004, \$890.5 million worth of Philippine goods (or 10.5% of the Philippines’ total exports to the U.S. from January to November) entered the U.S. duty-free under the GSP program. 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. The Philippine government has recognized the significance of the GSP program to its economy and the need to improve its IPR record in order to claim eligibility under the program.⁴⁵

The Philippines Should Not Introduce Holograms

IIPA understands that some discussion has begun regarding the introduction of a “hologram” which would be required to be placed on copyrighted materials in the Philippines. The government has apparently stated its purpose to generate revenue (and not as an anti-piracy device). In IIPA’s experience, hologram programs put into place do not function well as an anti-piracy device. The reasons are:

- Holograms are overly costly, increasing costs to copyright owners and making it easier for pirates to do business.
- Applying for holograms places an additional burden on right holders who are trying to do legitimate business.
- Pirates have found ways to circumvent the system, either by producing false holograms, or obtaining holograms by showing fraudulent documentation/licenses.
- Increasingly, copyrighted materials are not appropriate carriers for holograms (i.e., shrinkwrap makes placement of holograms unwieldy, “original equipment manufacture” practices dictate pre-loading of copyrighted materials, meaning there is no physical good to place a hologram, etc.)

⁴⁵ Felepe F. Salvosa II, *Continued inclusion in watchlist puts trade privilege at risk - DTI US may withdraw duty-free status for RP exports*, BusinessWorld Manila, May 17, 2004, at <http://www.bworld.com.ph/current/TheEconomy/ecostory2.html> (in which Trade Secretary Cesar A.V. Purisima warned citizens that “the Philippines is in danger of losing its trade privileges with the United States if it continues to remain in the latter’s watchlist of intellectual property rights (IPR) violators”).

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