

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2006 SPECIAL 301 REPORT

### PHILIPPINES

#### EXECUTIVE SUMMARY

**Special 301 Recommendation:** The Philippines should be on the Priority Watch List if significant progress has not been made to address the action items below.<sup>1</sup>

#### **Priority Actions Requested in 2006:**

- **Reverse Solid Laguna:** The *Solid Laguna* case sets the proof standard impossibly high for obtaining a search warrant, probably implicating the Philippines' TRIPS obligations. The Philippine Government has indicated that the *Columbia* decision is still the law, with its more acceptable proof standard for obtaining a search warrant, since it was decided *en banc*. It is reasonable to ask the Supreme Court to rehear the *Solid Laguna* case *en banc* to decide it in light of the standing precedent in *Columbia*; the legislature should also pass a law codifying *Columbia* and overruling *Solid Laguna* to ensure that the rule for obtaining a warrant is clear.
- **Significantly Increase Criminal Prosecutions for Piracy in the Philippines:** Inspections of pirate optical disc plants, seizures of pirate imports at the borders, and raids on retailers are not being followed by significant criminal prosecutions, and thus there is little deterrence as a result of enforcement activities in the Philippines. The OMB, Customs, and other appropriate enforcement authorities must, in addition to continued investigations, raids and seizures, significantly step up arrests, and the reconstituted Department of Justice IP Task Force must devote the resources to bring criminal cases against the owners, directors and financiers of pirate optical disc plants, and importers and distributors of pirate product (including optical discs, books, and other media). In cases where convictions have already been achieved and sentences meted out, those sentences must be served.
- **Establish a Mechanism to Investigate Leaks, Judicial Delays and Other Irregularities:** Right holders are consistently stymied by irregularities in the Philippines, including leaks of raid targets, delays in the judicial process, unsuccessful raids due to passage of time, loss of evidence after raids, etc. The Philippine Government needs to establish an independent executive oversight group at the highest level which will handle and investigate complaints by right holders into such irregularities. Where an investigation reveals mistakes or if acts of malfeasance are discovered, the appropriate remedy or disciplinary action should be taken.
- **Re-Establish IPR Court, and Develop IP Expertise in Judges and Prosecutors:** Court cases in the Philippines drag on for years and rarely result in successful judgments or criminal convictions. Due to incessant appeals processes, the chances of a convicted criminal going to jail for piracy are remote. Judicial processes to obtain enforcement of

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<sup>1</sup> In making this recommendation, IIPA notes that the USTR is in the midst of its out-of-cycle review (OCR), in which IIPA recommended that USTR retain the Philippines on the Priority Watch List. In response to a paper "Strengthening the IP System" submitted to USTR by the Philippine Government, and the submission from Adrian S. Cristobal, Jr., Director General of the Intellectual Property Office, dated December 12, 2005, IIPA urged the Special 301 Committee to postpone any OCR decision pending resolution of issues for which the Philippine Government's responses were inadequate or raised further questions about IP protection in the Philippines. IIPA's recommendation in this report demonstrates that many key issues remain unresolved.

copyright are now complicated greatly by the *Solid Laguna* case. In other cases, judicial delays are tied to irregularities in the system (e.g., leaks). IIPA strongly supports the Government's reconstitution of the DOJ Special IP Task Force as well as its stated goal of re-establishing specialized IP courts in the Philippines, and the Government must devote resources necessary to devise programs to develop expertise in prosecutors and judges chosen.

- **Address Book Piracy:** Book piracy, in the forms of illegal photocopying, offset print piracy, and CD-R "burning," damages U.S. publishers in the Philippines. The Government must do more to combat these forms of piracy. Key to the success of any plan on book piracy are: 1) more raiding, including *ex officio* action against pirate photocopying and CD-R burning, including on university and school campuses; and 2) effective enforcement against offset pirate printers including remaining abusers of PD 1203.
- **Address Internet Piracy Threat:** In 2005, the Philippines had one of the fastest rates of growth in the world (well over 100%) in number of broadband lines. There are also reportedly many Internet cafés which use unlicensed software. The Government of the Philippines needs to take sustained (not one-time as occurred in November 2005) actions to legalize all usage of copyright content on the Internet. The Government should also pass House Bill 3308 and Senate Bill 1973, which aim to modernize the Philippines' protection of copyright and enforcement system, and to fully implement the key international agreements with respect to copyright, including the Berne Convention, the TRIPS Agreement, and the WIPO "Internet" Treaties, the WCT and WPPT.
- **Permanently Establish PAPT:** The Philippine Anti-Piracy Team (PAPT) was established in 2005 to eradicate software piracy. PAPT should be permanently established, and a body similar to PAPT should be permanently established, to result in cross agency cooperation and communication and hard hitting enforcement actions, with sufficient resources to focus on all forms of piracy and to significantly reduce piracy rates.
- **Pay TV Piracy Must be Curbed:** Cable and satellite piracy remains problematic in the Philippines. More actions such as that taken against Destiny Cable must be taken to curb the estimated 800 pirate cable systems' negative impact on the pay television sector.

For more details on Philippine's Special 301 history, see IIPA "History" Appendix to this filing at <http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.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: 2001-2005<sup>2</sup>**

INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software <sup>3</sup>	43.3	71%	38.0	71%	33.0	72%	25.0	68%	19.9	63%
Entertainment Software <sup>4</sup>	11.3	85%	NA	90%	NA	95%	NA	NA	NA	99%
Books	48.0	NA	48.0	NA	45.0	NA	45.0	NA	44.0	NA
Records & Music <sup>5</sup>	21.0	40%	20.0	40%	22.2	40%	20.9	40%	23.9	36%
Motion Pictures <sup>6</sup>	NA	NA	33.0	85%	33.0	89%	30.0	80%	28.0	80%
<b>TOTALS<sup>7</sup></b>	<b>123.6+</b>		<b>139.0</b>		<b>133.2</b>		<b>120.9</b>		<b>115.8</b>	

## **PIRACY AND ENFORCEMENT UPDATES IN THE PHILIPPINES**

**Solid Laguna:** The *Solid Laguna* case,<sup>8</sup> dating back to 2000, involved suspected massive optical disc production at a manufacturing facility in Manila. The local police applied for a search warrant to raid the facility. In support of the application, three people gave evidence: the police officer responsible for the case; an official from the local Videogram Regulatory Board (now replaced by the Optical Media Board (OMB)); and a private investigator. The police and the investigator had obtained pirate discs from the market and had been given information by an informant that the reproduction was occurring at the *Solid Laguna* plant. The application for a search warrant was supported by affidavit evidence from the copyright holder as to the rights concerned. The warrants were granted by a judge, a raid was conducted, and evidence of huge volumes of pirate production was seized. On application from the factory owners, the warrants were later quashed. Appeals were rejected, and on a petition for certiorari to the Philippine Supreme Court, the Court ruled upheld the quashal of the warrants on the basis that there was no probable cause. The Court stated in its ruling,

To us it is not enough that the applicant and his witnesses testify that they saw stacks of several alleged infringing, pirated and unauthorized discs in the subject facility. The more decisive consideration determinative of whether or not a probable cause obtains to justify the issuance of a search warrant is that they

<sup>2</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission, and is available on the IIPA website at [www.iipa.com/pdf/2006spec301methodology.pdf](http://www.iipa.com/pdf/2006spec301methodology.pdf).

<sup>3</sup> BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in the Philippines, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

<sup>4</sup> 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. For the Philippines, this number represents the value of pirate PC games, not including console or handheld games.

<sup>5</sup> 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.

<sup>6</sup> MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

<sup>7</sup> Total losses due to piracy of records & music, business software, and books went up from \$106 million in 2004 to \$112.3 million in 2005.

<sup>8</sup> *Sony Music Entertainment (Phils), et al v. Hon. Judge Dolores Español et al* (G.R. No 156804, March 14, 2005).

had *personal knowledge* that the discs were *actually infringing*, pirated or unauthorized copies (emphasis added).

and

It cannot be overemphasised that not one of [the applicants or his witnesses] testified *seeing the pirate discs being manufactured* at [the subject facility's] premises (emphasis added).

This ruling creates an unworkably high evidentiary burden for right holders to simply obtain a warrant. The evidentiary burden here is far higher than that set in the *Columbia* case referred to by the Philippine Government. In that case, the Supreme Court held that the procedure for obtaining a search warrant

does not rule out the use of testimonial or documentary evidence, depositions, admissions or other classes of evidence tending to prove the *factum probandum*, especially where the production in court of object evidence would result in delay, inconvenience or expenses out of proportion to its evidentiary value ...

The *Columbia* case was decided by an *en banc* panel of the Supreme Court. The Philippine Government has claimed that the ruling of the Supreme Court's Third Division in *Solid Laguna (Sony)* could not have established a doctrine or principle abandoning or rejecting that of an *en banc* decision (i.e., the decision in the *Columbia* case), by the terms of the Philippine Constitution. However, we find it hard to conclude anything but that *the rule* set out in the *Solid Laguna* case is at odds with, departs from, and clearly does not follow *the rule* in the *Columbia* case. The Supreme Court should take up the *Solid Laguna* case *en banc*, as it did in the *Columbia* case, to set the record straight about the rule to be applied in obtaining a search warrant. The fact that the Supreme Court declined to consider the Motion for Reconsideration and that this ruling post-dates the *Columbia* decision indicates that *Solid Laguna* remains the law.

The evidentiary standard set in *Solid Laguna* falls well outside the mainstream of other countries with respect to grants of search warrants and seriously jeopardizes the expeditious availability of warrants. The application of the *Solid Laguna* case to other instances could lead to courts not granting search warrants expeditiously in cases involving copyright infringement or piracy. Effective criminal enforcement in the Philippines depends on the expeditious availability of warrants. Lack of availability of search warrants in the Philippines would result in less "effective action," lack of "expeditious remedies" against infringement and lack of "remedies which constitute a deterrent" to further infringement. It is a basic principle of the TRIPS Agreement (set out in Article 41.1) that enforcement procedures must be "available" in practice (not just on the books) in order to meet the TRIPS standard.<sup>9</sup>

**The Philippine Court System Does Not Deter Piracy:** Two aspects of the Philippine court system thwart successful judicial enforcement in the Philippines. Court cases drag on for years and rarely result in successful judgments or criminal convictions; due to incessant appeals processes, the chances of a convicted criminal going to jail for piracy are remote. Second,

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<sup>9</sup> The WTO Appellate body confirmed as much in the Havana Club case where it held (with respect to Article 42 of the TRIPS Agreement) that it is not sufficient to have the required procedures available in theory; right holders must have actual access to – and be able to make use of – the procedures under the Agreement.

judicial processes to obtain enforcement of copyright are now complicated greatly by the *Solid Laguna* case, and judicial delays are sometimes tied to irregularities in the system.

The slow pace of the judicial system is the cause of greatest concern. Right holders enter the judicial system in the Philippines at their own peril, as cases can drag on for many years, thereby causing an immense financial and resource burden on the copyright holder. An example is the *Beltron* case, arising out of a raid for illegal importation, sale and distribution of pirate/counterfeit software by the target in 1995.<sup>10</sup> On June 21, 2005, nearly ten years after the initial raid, the Supreme Court found in the plaintiff's favor and against Beltron, that the Department of Justice exhibited a "grave abuse of discretion" for dismissing the case. Another example of justice gone wrong is the *Multilinks Book Supply* case, involving the Marquez defendants. Ms. Catherine Marquez was convicted on June 22, 2004, and sentenced to one year in jail and to fines of P50,000 (US\$971) per count for copyright piracy. To this day, she remains free, and she remains in the piracy business.<sup>11</sup> Based on evidence gathered throughout 2005, the Marquezes were raided once again on August 3, 2005, and a second prosecution was initiated. IIPA would be interested to know what the terms of Ms. Marquez' release are. IIPA understands Ms. Marquez' motion for reconsideration at the Court of Appeals was denied on September 26, 2005. The availability of never-ending appeals in this case – a cut-and-dried piracy case – signals to others that one can commit brazen acts of copyright piracy, be finally convicted, and never see punishment or jail time. It is difficult to imagine a clearer example of lack of deterrence than what has occurred in these cases.<sup>12</sup>

In November 2005, the Department of Justice Secretary Raul M. Gonzalez, pursuant to a request from the Intellectual Property Office (IPO), reconstituted a Department of Justice Task Force to prosecute cases, limiting the number of prosecutors in Manila to six, but assigning "one (1) prosecutor and one (1) alternate" for each province and city throughout the Philippines to handle IP cases.<sup>13</sup> IIPA is pleased that such resources are being devoted to prosecute copyright piracy cases in 2006, and hopes to see results in criminal convictions for piracy, with deterrent sentences sought by prosecutors, and meted out by judges, which are then actually served after expedited appeals. It is rather telling that of 1,685 cases reported by the DOJ, 718 were "disposed of" with only 367 "filed in court." Nearly 1,000 of these cases remain "pending" (which we understand to mean the case files are still being investigated/assembled for possible prosecution). With only two convictions to show for all the cases of piracy in the country, and with neither of those convicts having paid a fine or served a sentence in jail, it is no wonder there is no deterrence against piracy in the Philippines. IIPA can only hope the reconstitution of the DOJ Task Force will lead to a dramatic change in results in 2006.

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<sup>10</sup> On November 20, 1995, Beltron Computers (a former licensee of Microsoft) was raided under the previous copyright law, resulting in seizure of 35 CPUs, 2,831 PCs, and unauthorized Microsoft software on CD-ROMs. The criminal complaint by Microsoft against Beltron Computer was dismissed by DOJ on October 26, 1999, stating that the respondent, being a former licensee of Microsoft, had business transactions with the latter, making Beltron's alleged reproduction of Microsoft software civil in nature (breach of contract, not criminal). After several unsuccessful appeals and motions for reconsideration, the case went up to the Supreme Court on a Petition for Certiorari, alleging grave abuse of discretion.

<sup>11</sup> It appears several government-run universities, hospitals and agencies are ordering photocopied books from her.

<sup>12</sup> To cite one more case, in *People of the Philippines v. Eugene Li*, the defendant was convicted in a joint decision involving copyright infringement, trademark infringement and unfair competition, and was sentenced on February 10, 2005 to two years imprisonment and a fine of PP100,000 (US\$1,942), a totally non-deterrent fine. Mr. Li has appealed the sentence. The seemingly never-ending appeals process leads to an overall lack of deterrence as to the particular defendants involved (as demonstrated by the Marquez case) as well as to society at large.

<sup>13</sup> This was accomplished as per Department Order No. 657 s 2005.

**Proposed Reconstitution of Special IP Courts:** IPO Director General Adrian S. Cristobal Jr. has proposed to the Supreme Court the re-creation of special courts that would solely handle intellectual property rights cases in an effort to speed up resolution of IP cases, and the Supreme Court (SC) has acted favorably on the request in an *en banc* resolution dated July 26, 2005.<sup>14</sup> To date, however, such courts have not been established. Of course, the mere “reintroduction” of special IPR courts will not solve the problem of slow case progression. Proper training of IPR court judges is needed. Despite extensive training seminars already given and attended by numerous judges both in the Philippines and abroad, there remain few judges who are fully aware of IPR issues.

**Book Piracy:** Book piracy in the Philippines remains a major problem, 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. Due to some enforcement efforts in 2005 by the publishers,<sup>15</sup> some awareness is beginning to spread around the pirate photocopy community. Pirate photocopying has traditionally taken place most often in commercial establishments surrounding universities or in street stalls concentrated on a single street or small group of streets.<sup>16</sup> 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 possessing stockpiles of infringing goods by copying on a “print to order” basis, complicating investigations and enforcement actions.<sup>17</sup> It is ironic that one set of photocopiers is in operation near the Philippine Regulations Commission, the government institution which regulates professional businesses in the country.

To address photocopy-shop piracy, U.S. publishers have worked steadily with authorities at the Philippine National Police (PNP) and National Bureau of Investigation (NBI), and stand ready to work with authorities on further cases at any time.<sup>18</sup> By contrast, IPO never raids on behalf of publishers, so it is up to NBI and PNP to provide effective enforcement, and they have not traditionally raided *ex officio*. Since much of the photocopy piracy is done on or around university campuses, it would be important for the Commission on Higher Education (CHED) and the Department of Education (DepEd) to get involved in the issue, especially where on-

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<sup>14</sup> As a result of the Resolution, the proposal was forwarded to the Supreme Court’s Office of the Court Administrator to determine which courts would be designated IP courts.

<sup>15</sup> Most enforcement in the Philippine by the publishers is self-initiated. Raids have had a slight effect in 2005 on the open availability of foreign titles, e.g., medical titles, in the copyshops.

<sup>16</sup> 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.

<sup>17</sup> 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.

<sup>18</sup> The Philippine Government, in its December 2005 submission to USTR, indicated that it had experienced “difficulties in obtaining cooperation” from publishers. U.S. publishers, in order to accommodate onerous requirements for proving copyright ownership of individual titles seized in a raid, often require a couple of days post-raid to prepare complaints for submission. Without such preparatory work, foreign right holders risk prosecutions being thrown out for failure to produce proper documentation of ownership. In one case in August 2005, in a raid requested by representatives of U.S. publishers (because PNP does not run raids *ex officio*, a separate concern), the Philippine Government became frustrated by the publishers’ request for time to prepare documents for the complaint, preferring a speedy decision to file a criminal complaint the night of the raid. At no time, however, was there any lack of cooperation by right holders. In such circumstances, it was unreasonable for the Philippine authorities to ask for immediacy with respect to pressing charges after the raid, and it is a mischaracterization to equate the care being taken by right holders to ensure successful application of Philippine laws with “difficulties in obtaining cooperation.”

campus activity is involved.<sup>19</sup> U.S. publishers stand ready to meet with CHED and DepEd to discuss publishers' issues. Furthermore, publishers are encouraged by signs of inclusion from OMB and hope that cooperation with that agency will increase.

The Philippine Government has indicated that “[w]hat is being considered is a plan being crafted by the National Book Development Board (NBDB) to have the universities and schools enter into licensing agreements with copyright owners.” While this is only one part of even the photocopy piracy problem, IIPA welcomes a “plan” but insists that right holders must be involved in the process of establishing terms, and publishers are excited about the possibilities offered by the partnership between the Government and the International Federation of Reproduction Rights Organizations (IFRRO) in this regard. However, IIPA notes that such a scheme is distinct from an overall “plan” to fight book piracy, and that licensing organizations do not comprise a “one stop” solution to book piracy in all its forms.<sup>20</sup>

Pirate reprints are a good example of where licensing cannot solve the problem. In the past, pirate booksellers relied on the “excuse” that their books were produced pursuant to Presidential Decree 1203, albeit that PD was repealed more than nine years ago.<sup>21</sup> The NBDB published a resolution in January 2006, declaring that “[t]he commercial reprinting of books without the knowledge of their copyright owners is definitely illegal under R.A. 8295.”<sup>22</sup> This declaration is a good start and should be interpreted to be in effect immediately. While IIPA is encouraged by such an active statement, the more important action will be the follow up to that statement. Prior to the issuance of this statement, the IPO had previously gathered the distributors of books purporting to be reproduced or left over under Presidential Decree 1203, asking them to remove the illegal stocks from their stores. While this no doubt resulted in some improvement, it was not lasting and there has been no follow up by IPO or anyone else. Government monitoring, inspections and enforcement have not occurred, and they are necessary to ensure that there are no more illegal reprints in the Philippines, not just “1203” reprints but all offset piracy.<sup>23</sup>

**Optical Disc Piracy Production for Domestic Consumption and Pirate Imports Remain Serious:** Optical disc piracy in the Philippines consists of imports, particularly from China and Malaysia, less so from Indonesia,<sup>24</sup> but local pirate production is increasing, now making up at least 30% of pirate discs. There are now eleven optical disc production facilities, including two mastering facilities and one DVD-9 facility (with two lines); industry estimates there are roughly 38 lines in the Philippines, amounting to production capacity of 133 million

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<sup>19</sup> Third party vendors renting space on campuses, for instance, conduct illegal activities with impunity.

<sup>20</sup> Indeed, it should never be the goal of a government or a licensing body to simply “legitimize” illegal practices through licensing. Licensing has an important place in a developing market for published materials. However, licenses for photocopies should never replace sale of an entire legitimate book. The Government must be careful in crafting a licensing scheme to ensure a fair and diverse market for right holders and users alike.

<sup>21</sup> The PD 1203 issue, unlike the Marquez case (which is about illegal photocopying), has to do with booksellers dealing in illegal reprints.

<sup>22</sup> Statement by NBDB Chairman Dennis T. Gonzalez, printed in the *Manila Bulletin*, January 15, 2006.

<sup>23</sup> Local publishing representatives report that stores such as “Miriam Webster” Bookstore and Jade Bookstore still sell “1203” copies.

<sup>24</sup> Shipments of optical discs into cities in the southern Philippines appear to be rampant because syndicates are aware that the OMB does not maintain a presence outside of Manila, and relies heavily on other law enforcement agencies when conducting seizures outside of Manila. Pirate concert DVDs are becoming more prevalent in the marketplace. The majority of these products appear to be of Chinese origin, although significant numbers of Indonesian and Malaysian discs are being found. The quality of the Chinese finished product is generally better but the DVD functions are frequently limited or defective.

discs per year. There is little authorized production,<sup>25</sup> and unfortunately, in the Philippines, the capacity to produce optical discs exceeds the ability of right holders to license production.

The Philippine Government, in its December submission to USTR, indicated that three administrative actions had been taken against plants inspected so far. IIPA is appreciative of OMB's efforts to try to eradicate pirate optical disc production occurring in the Philippines, and encourages the regular (and unannounced) inspections in tandem with industry representatives to continue. Unfortunately, the results of the administrative cases have not been overwhelmingly favorable due in part to lack of OMB efforts, lack of administrative capabilities, and lack of transparency. For example:

- In the *Bright Future* case, the replication equipment was given back to the pirate operator by the court, and its whereabouts remain unknown.
- In the *Alpha Plus* case, this pirate plant was criminally fined but has since been re-licensed by the OMB. An effective optical disc law would not permit the re-licensure of a company just convicted for violating the statute.
- In the *MHN Optical Technologies, Inc.* matter,<sup>26</sup> three inspections led to three administrative complaints. While OMB received an Order to remove "injection [molding] machines, downstream equipment, printing equipment, molds, and controllers," the equipment could not be removed and electricity could not be shut off because the plant is in a "special economic zone" and thus would require the involvement of the Philippine Export Zone Authority and the Bureau of Customs. That the equipment was not even sealed, and that no follow up action was ever taken, is indicative of a breakdown in the enforcement against optical disc piracy. OMB claims the machinery remains "locked up" inside the plant, but no industry representatives have been permitted to verify this.

In addition, the problems of storage of seized items (i.e., as of late 2005, the warehouse being used had closed down) are recognized by the Government. In particular, industry has no knowledge of the "rebid" process that the Government reports took place on December 13. The contract process for the storage of seized items has not been made transparent to right holders.

**Plant Inspections and Retail Raids Notwithstanding, There Have Been Few Arrests and No Prosecutions:** The Optical Media Act as implemented does not fully address the need for proper enforcement against optical disc piracy. All of the registered replication facilities in the Philippines were inspected in 2005, leading to some seizures of pirate discs and machinery (the Government of the Philippines reports seizures in 2005 of more than 3.3 million discs and 11 replicating lines, among other items).<sup>27</sup> However, problems remain in the inspections, including

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<sup>25</sup> The Philippine Government, in a submission to the United States Trade Representative in 2005, claimed that much of the production in the Philippines is licensed, e.g., by "Warner Home Video, Magnavision, and Viva Video." With respect to Warner Home Video, it is true that on one occasion a plant claimed that it was licensed by Warner Bros. to replicate certain titles. However, the documents provided to the OMB were fraudulent. The OMB claimed legitimacy in its report without consulting Warner Bros..

<sup>26</sup> OMB Admin. Case Nos. 2005-09-761 and 762. According to the Philippine Government, the plant was inspected on August 12, September 9, and October 7, 2005.

<sup>27</sup> One raid in April 2005 appears to have been compromised by a leak – very little pirate product was found. It had been estimated that the plant was putting out up to 320,000 discs per day, including movies, music, and video games. The OMB arrested eleven Taiwanese nationals (none of them was charged; instead, they were immediately deported), and seized eight replicators, five bonding machines, four printing machines, and several sacks of polycarbonate. No information has been forthcoming about the final disposition of the seized items or whether charges were brought against those arrested in the factory raid. More important, there is no information forthcoming about the actual plant owners and whether they have been prosecuted. The machinery in this case was returned after the warrant was quashed by the judge. There is still no confirmation as to the actual owners of the plant. The

leaks and quashals of warrants (see discussion above regarding the impossibly high burden set in the *Solid Laguna* case). Furthermore, the Government is not targeting owners, directors, executives, or financiers of these plants for criminal prosecution. Until problems in the enforcement process are fixed and key figures in pirate production are prosecuted criminally, right holders in the Philippines will suffer from optical disc pirate production. In 2006, OMB should immediately commence a new round of inspections. In addition, to further strengthen the OD regime, the government of the Philippines should amend the law or regulations to require that any licensee of an OD plant be a significant shareholder or office holder (personal liability clause), and to require OD plant owners/operators to declare all foreign investment in the company.

Retail raids in malls where piracy has been prevalent resulted in seizures of several million pirate discs and resulted in some decrease in piracy in certain malls;<sup>28</sup> however, the piracy situation remains roughly the same in many malls,<sup>29</sup> and is actually reported to have gotten worse in a couple, including one in Quiapo.<sup>30</sup> The software industry and publishers also enjoyed some positive raid results in 2005.<sup>31</sup> However, there have been relatively few arrests<sup>32</sup> and criminal copyright prosecutions, and as such there is little deterrence in the market.<sup>33</sup> For example, while Virra Mall – a piracy haven – was closed down in late 2004, a relocation of the pirate vendors to a new entertainment complex called Metrowalk, under the same security coordinator as that for Virra Mall, has meant little drop-off in the sale of pirated product. While OMB has raided Metrowalk, we understand that leaks have compromised the raids.<sup>34</sup>

**Irregularities in Enforcement System Must be Resolved:** Right holders are consistently stymied by irregularities in the Philippines, including leaks of raid targets, delays in the judicial process, unsuccessful raids due to passage of time, loss of evidence after raids, etc. For example, items found in inspections are often not seized (as noted in the MHN inspection). Also, in 2004, some recorded music product found on the street dated from 2001-2002, and there is some support for the assertion that there has been some unauthorized release of (and

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registered licensee of the plant is allegedly not the real owner. There were three other inspections in 2005, all involving the same manufacturing plant, that resulted in no preventive actions even though illegal manufacture was occurring during the inspections.

<sup>28</sup> The Philippine Government notes raids from January to December by OMB, NBI, and/or the Philippine National Police (PNP), including 25 raids in Quiapo, 39 raids in Binondo, and 11 raids in Makati Cinema Square.

<sup>29</sup> E.g., at Royal Family Mall in Valenzuela; Coastal Mall in Paranaque; Northmall, LRT in Caloocan; Makati Cinema Square in Makati; Metrowalk Mall in Ortigas; Park Lea, Shaw Blvd. in Mandaluyong; Riverbank Center in Marikina City; and Harrison Plaza, in Manila.

<sup>30</sup> According to industry reports, the piracy situation worsened in Quiapo Barter Trade area, and Arlege Street/Elizondo Street.

<sup>31</sup> For the software industry, for example, the OMB and PNP raided stores selling pirated software in Shoppesville in Greenhills, Harrison Plaza in Manila, Orient Pearl in Recto, MetroWalk in Ortigas and MRT Shaw, Mandaluyong City. In total, between September and October 2005 PhP19 million (US\$369,040) worth of pirated software, computers and servers were confiscated. IIPA also appreciates that the OMB worked in 2005 with local publishing representatives to include the industry's optical disc products in its retail raids.

<sup>32</sup> An American and his Filipino partner were arrested by National Bureau of Investigations (NBI) for selling and distributing pirated business software in Cebu.

<sup>33</sup> The Philippine Government report "Strengthening the IP System" mentions only two copyright defendants convicted, and only one defendant convicted in 2005 (Mr. Eugene Li, who is listed three times, in case Nos. 03-0320, 03-0321 and 03-0322; the cases were combined and resulted in one combined sentence), and Ms. Catherine Marquez (case Nos. MC-00-3006 to MC-00-3015), who was convicted in 2004, and still remains not only out awaiting appeal but in the piracy business.

<sup>34</sup> OMB staff and PNP have been seen talking to traders before a raid and/or at the end of a "negative" raid and hearsay evidence suggests other irregularities, including the possibility that protection money is being solicited. The security manager employed at Metrowalk was previously employed as the security manager at Virra Mall and has been heard to boast that his stall owners "cannot be raided" by the OMB.

even offers to sell) formerly seized products from their storage areas. Raids are leaked in advance, and even when raids result in pirate seizures, supporting evidence in the form of paperwork, stampers, etc. is not found on the premises. IIPA also expresses serious concerns that the Bureau of Customs is not enforcing against known piracy, while pirate imports, especially optical discs, continue to flood the Philippine market from China and Malaysia, and to a lesser extent, from Indonesia.<sup>35</sup> Finally, judicial delays are tied to irregularities in the system (e.g., delays in warrants followed by less-than-successful raid results due to leaks).

**Signal Theft (Cable and Satellite) a Growing Problem in the Philippines:** Signal piracy is a growing problem in the Philippines, resulting in a decrease in revenue for right holders in broadcast programming. The Cable and Satellite Broadcasting Association of Asia (CASBAA) estimates revenue losses of US\$70 million in 2005, a 16% increase over 2004. Moreover, industry analyst Media Partners Asia estimates that more than 50% of homes in the Philippines receive pay television illegally.

The two major concerns are that: small cable television operators are moving to the use of pirated programming; and the Government fails to effectively enforce rights in legitimate programming. Specifically, the National Telecommunications Commission (NTC) has failed to invoke its authority to revoke the licenses of the operators that utilize pirated programming. However, it is encouraging that the target of right holders' complaints with the NTC of unauthorized broadcasts (Destiny Cable) was not transmitting unauthorized programming as of January 2006, in compliance with a second cease and desist order in late November 2005 (importantly, the order threatened suspension of the license for non-compliance). This is evidenced by a recent case brought by the Motion Picture Association against a prominent Manila-based cable TV operator openly offering pirated channels to its subscribers. Rather than revoking or suspending the license of the operator, the NTC has merely issued cease and desist orders, which have in turn been ignored by the operator without repercussion.

Also of note is that the Intellectual Property Office (IPO) and the National Bureau of Investigations (NBI) have been extremely cooperative in three recent industry funded criminal raids of pirate operators. These three operators, unfortunately, were able to return to pirated broadcasts within days, re-joining the ranks of the hundreds of cable TV operators throughout the country that use stolen broadcast signals to serve their subscribers. While the support of the IPO and NBI is much appreciated, the signal piracy problem in the Philippines is systemic and getting worse in the absence of a more comprehensive effort to require the over 800 cable TV operators to refrain from using broadcast signals without an authorization or payment. While the support of the IPO and NBI is much appreciated, the signal piracy problem in the Philippines is systemic and getting worse in the absence of a more comprehensive effort to eradicate unauthorized transmission of pay television signals.

It is believed that the NTC wishes to transfer responsibility to consider complaints of unauthorized broadcasts and infringement to the IPO. IIPA urges that the complaints should remain with the NTC, though any complaints involving alleged intellectual property infringement could be referred to the IPO for determination of that matter alone. In March/April 2005, IIPA also learned that the NTC was forming an Intellectual Property Rights Enforcement Action Panel

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<sup>35</sup> Sources indicate couriers regularly bring infringing DVDs through Manila airport as checked luggage, and reported seizures are non-existent. Movies, music, software, concert DVDs (bootlegs) are China and Malaysia; many of these pirate discs have SID codes erased. What raids have been run by Customs have involved smaller shipments, but at least demonstrate some cooperation between Customs and the OMB. In two raids in September and October 2005, Customs and the OMB seized 5,000 pirate movie DVDs and around 8,000 pirate movie DVDs in Cebu city (a cargo shipment that had arrived by air), respectively.

("IP-REAP") and published a Circular announcing the formation of IP-REAP and the Guidelines under which it would operate. The Circular has not been implemented, as the local cable TV operators, led by FICAP, have filed a case before the Court of Appeals querying the validity of the Circular and seeking a temporary stay of its implementation. Thus, it is believed that IP-REAP is dormant for the moment.

**Broadband Has Brought Internet Piracy to the Philippines:** With the increased availability of broadband both in homes and Internet cafés in the Philippines in 2005 (in 2005, the Philippines had one of the fastest rates of growth in the world – well over 100% – in broadband lines), illegal Internet downloads are becoming more of a threat to legitimate sales and distribution in the Philippines. For example, the business software industry reported that there were 1,613 online software infringements traced to Philippine ISPs in 2004, but that number grew to 5,412 in 2005 – translating to a 235% increase year on year, mainly in the P2P domain. The record industry notes similar trending. The Government has yet to take a systematic approach to address P2P piracy and downloading of content.

Roughly 1,500 Internet cafés were in operation in the Philippines at the start of 2005, and virtually all of these establishments profited from unauthorized exploitation of the most popular entertainment software titles. Internet cafés were targeted for enforcement in late 2005, and, for example, in September 2005, many Internet cafés closed down temporarily to avoid being raided on suspicion of piratical activity.<sup>36</sup> In late November 2005, the NBI conducted criminal raids in Metro Manila against three Internet cafés using unlicensed software. These raids reportedly led to the seizure of 286 computers.

**End-User Piracy:** End-user software piracy remains the most serious threat to the business software industry in the Philippines, severely inhibiting the growth of the legitimate market for software.<sup>37</sup> The business software industry has generally been pleased with the Philippine Government's response to calls to enforce against this form of piracy. In the first half of 2005, the NBI successfully conducted end user raids against two companies in Manila using pirated and unlicensed software. On August 24, 2005, the National Bureau of Investigation (NBI), the OMB and PNP, together with the IP Coalition, banded to launch the "Pilipinas Anti-Piracy Team" (PAPT), a campaign suggested by the Business Software Alliance that aims to curb software piracy in the Philippines. Since the start of the crackdown in mid-September 2005, NBI has conducted eight raids on corporations suspected of using unlicensed software. The raids were supported by wide publicity, which included PAPT holding a press conference at the end of October to announce the continued crackdown.<sup>38</sup> In total, since the crackdown began, Php19 million (US\$369,040) worth of pirated software, computers and servers have been confiscated. The PAPT Team has committed to keep the crackdown ongoing into 2006.

## **TRAINING AND PUBLIC AWARENESS**

IIPA members provided various public awareness and training activities in the Philippines in 2005:

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<sup>36</sup> Industry sources indicated that the Internet cafés were tipped off of potential raids and thus only shuttered their doors temporarily. At the same time, OMB was warning about some raids carried out by those claiming fraudulently to represent OMB or NBI, resulting in stealing computers and "extortion."

<sup>37</sup> The 71% piracy level in 2005 is unchanged from 2004, and is substantially above the Asia Pacific rate of 53% and more than double the world average of 35%.

<sup>38</sup> In addition, the IPO has encouraged members of the Call Center Association of the Philippines (an outsourcing firm) to enter into an MOU with the Business Software Alliance designed to ensure that only licensed software would be used within their organizations.

- In August 2005, the Business Software Alliance held a special seminar in Manila on software piracy, investigation and evidence collection for agents of the NBI Intellectual Property Rights Division (NBI-IPRD), OMB and PNP-CIDG Anti-Fraud and Commercial Crimes Division (PNP CIDG-AFCCD).
- On August 24, 2005, the BSA issued positive publicity around the impending crackdown after the formation of PAPT.
- The BSA coordinated education campaigns in 2005, including “Detox Your PC to Keep Your Business Healthy” in March 2005, which renewed BSA’s call to companies to manage their use of licensed software in their business to realize maximum productivity and security. This campaign was publicly supported by the Commission on Information and Communications Technology (CICT) at a press conference.
- The International Federation of Phonographic Industries-Philippine Association of the Record Industry Inc. held a training on optical disc piracy detection and enforcement.
- Other members have offered to provide trainings in 2005.

## **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.<sup>39</sup> 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 2005.<sup>40</sup>

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**

**Passage of House Bill 3308 and Senate Bill 1973 Needed:** IIPA strongly supports passage of House Bill 3308 and Senate Bill 1973, which aims to modernize the Philippines’ copyright protection and enforcement system, and to fully implement the key international agreements with respect to copyright, including the Berne Convention,<sup>41</sup> which is incorporated

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<sup>39</sup> Other important provisions in the draft cable law include some loosening of advertising restrictions and stiffer penalties for cable piracy.

<sup>40</sup> IIPA also understands that the bill contains foreign investment restrictions for some copyright industry sectors.

<sup>41</sup> Berne Convention for the Protection of Literary and Artistic Works, Paris Act of July 24, 1971 (as amended on September 28, 1979).

into the WTO TRIPS Agreement,<sup>42</sup> and the WIPO “Internet” Treaties, the WCT and WPPT.<sup>43</sup> This legislation would result in the Philippines adopting a world-class copyright law that complies with the major international treaties related to copyright, importantly including proper protections for copyright materials in the digital environment.

In particular, the Bill would expand the scope of reproduction rights to include temporary copies and would explicitly broaden the right to control all communications to the public, including by providing an interactive “making available” right for the digital world. The Bill would also provide critical protections against circumvention of “technological protection measures” and protections against unlawful tampering or use of “rights management information.” The Bill would also address other important areas in need of modernization, including increasing the term of protection for works and sound recordings in line with international trends, providing an importation right, narrowing certain exceptions which were arguably overly broad, providing for Berne and TRIPS-compatible protection for pre-existing works, providing criteria for secondary liability (e.g., as to landlords of pirate malls), expressly criminalizing end-user piracy, providing for a Berne and TRIPS-compatible presumption of ownership, strengthening border measures, providing for *ex parte* civil searches as required by TRIPS, providing for disclosure of information to right holders to assist in investigations of infringement, allowing “sampling” to efficiently deal with massive seizures of pirated materials, and lengthening the statute of limitations so it is not tied to the vagaries of the court timetable but rather is tied to the initiation of the case by the right holder.

The House Trade and Industry Committee held a public hearing on the Bill on November 22, 2005 and some IIPA members participated in this hearing. Another hearing was held on December 6.<sup>44</sup> The hearing concluded with a working committee being formed made up of the IPO, OMB, Intellectual Property Association (IP Lawyers’ Group), the IP Coalition, and a “consumer rights” group that advocates for expanding fair use and academic uses. The working committee is headed by Congressman Jack Duavit. The Committee is tasked to reconcile the

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<sup>42</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, GATT Doc. MTN/FA II-A1C (1994).

<sup>43</sup> See WIPO documents CRNR/DC/94 (the WIPO Copyright Treaty, or WCT) and 95 (the WIPO Performances and Phonograms Treaty, or WPPT), and, for the agreed statements concerning the treaties, see WIPO documents CRNR/DC/96 and 97. The government of the Philippines joined the WCT and WPPT on October 4, 2002, but has not fully implemented the Treaties. Because of the general nature of some of the key provisions of those Treaties (for example, the provisions on protection of “technological protection measures” from unlawful circumvention), it is not possible simply for the WCT and WPPT to be declared “self-executing”; rather, careful and full implementation of the requirements of the WCT and WPPT must be undertaken.

<sup>44</sup> At this hearing, it is quite unfortunate that the Intellectual Property Office did not support provisions in the bill that provide protection for temporary copies, holding that this was not a requirement in the WIPO Treaties. IPO is incorrect in its assertion and we urge IPO Staff to reconsider this position and would welcome a dialogue with them. In the networked digital environment, the right to make and use temporary copies of all kinds of works is attaining ever-increasing economic significance, and indeed in some cases will become the primary means of legitimate exploitation of copyrighted materials. Thus, it is important to take stock of the global trend with respect to protection of temporary copies under the reproduction right. Before the WIPO treaties were concluded, there was significant debate about what the proper status should be for certain types of ‘transient’ or ‘temporary’ reproductions, with some arguing that there should actually be a carve-out from the reproduction right. Most felt that this would create unnecessary legal fictions, and today, there remains little doubt as to the normative standing of temporary copies under the reproduction right in international copyright law. It can no longer be questioned that the Agreed Statements concerning the reproduction right – the Agreed Statement to Article 1(4) of the WCT, and the Agreed Statement concerning Articles 7, 11 and 16 of the WPPT – mean that the concept of reproduction under Article 9(1) of the Berne Convention, which extends to reproduction “in any manner of form,” must not be restricted just because a reproduction is in digital form, through storage in an electronic memory, or just because a reproduction is of a temporary nature.

proposed amendments with the various positions taken by different interest groups and the IPO. IIPA hopes House Bill 3308 and Senate Bill 1973 will achieve passage in 2006.

**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 meets certain discretionary criteria, including whether it provides “adequate and effective protection of intellectual property rights.” In 2004, \$965.3 million worth of Philippine goods were imported to the United States duty-free under the GSP program, accounting for 10.6% of its total imports to the U.S. For the first 11 months of 2005, \$935.9 million worth of Philippine goods (or 11.1% 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.<sup>45</sup>

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<sup>45</sup> 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”).