

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2007 SPECIAL 301 REPORT

PHILIPPINES

Special 301 Recommendation: The Philippines should remain on the Watch List¹ in recognition of some good work by the government in the fight against piracy. However, because of the lack of criminal convictions against pirate plant owners and mall owners, general ineffectiveness of the courts hearing piracy cases, the continued prevalence of book piracy, optical disc piracy, Pay TV piracy, and the unknown final disposition of pirate goods and materials and implements found in various raids, IIPA calls for the U.S. government to conduct an out-of-cycle review to determine whether the Philippine government has taken adequate steps to address these concerns.

EXECUTIVE SUMMARY

The government of the Philippines made some strides in 2006 against copyright piracy. Several optical disc plants were shut down (some due to raids carried out by the Optical Media Board, under the leadership of OMB Chairman Edu Manzano, and some that closed for other reasons). In addition, the Philippine National Police, under the leadership of Philippine National Police Senior Superintendent Noel de los Reyes, has turned a corner for the better, taking actions on right holder requests and informing right holders of specific piracy issues (but still not exercising *ex officio* authority). Despite the efforts of OMB and the PNP, problems in the Philippine IP enforcement system and some forms of piracy persist. For example, illegal photocopying of books, offset print piracy, and CD-R "burning" severely damage U.S. book publishers in the Philippines. The lack of prosecutions of key pirate operators, including plant owners, mall operators and pirate book producers, keep those who engage in piracy activities in the Philippines largely insulated from consequences. There have been only a handful of criminal cases that have proceeded to conviction (and some of those cases, as well as some criminal cases that remain pending, were commenced over 10 years ago). Signal theft remains a major problem in the country. Finally, notwithstanding the actions against optical disc plants, optical disc piracy (whether locally produced or imported, e.g., from China) remains a major piracy concern.

¹ In its out-of-cycle review (OCR) announcement on February 15, 2006, the United States Trade Representative decided to lower the Philippines to the Watch List, noting improvements in IPR protection, and noting that "[t]he United States will use the bilateral Trade and Investment Framework Agreement to engage the Government of Philippines on strengthening its IPR regime." See http://ustr.gov/Document_Library/Press_Releases/2006/February/US_Government_Praises_Philippines_for_Improved_IPR_Enforcement.html. On February 7, 2006, President Arroyo issued a memorandum through Cabinet Secretary Ricardo Saludo to the Office of the Press Secretary, the head of the government's mass media, Department of Justice, Department of the Interior and Local Government, Philippine National Police, Optical Media Board and the Philippine Information Agency. See *Pigma Orders Anti [Piracy] Copyright Drive, Names Cristobal as Oversight Head*, Philippines News Agency, February 7, 2006. It is ironic that, on the same day, pirates were doing booming business in the malls in Manila. See *Pirates envelop Manila as bootleggers flourish*, Feb. 18, 2006 (noting, "[t]he United States has removed the Philippines from its intellectual piracy "priority watch list," but in Manila's malls it was business as usual Friday for hawkers selling copies of the latest Hollywood movies. 'Friday is one of our busiest days. People always stock up,' said Raul, as customers perused stacks of pirated discs at his stall, including films such as "Munich" and "Walk the Line" that are still in theatres).

PRIORITY ACTIONS REQUESTED IN 2007

- **Carry Out Tougher Enforcement Against Unlicensed, Unregistered (Including Formerly Licensed/Registered) Plants, Seizing and Properly Disposing of Machinery**
- **Stop the Flow of Pirate Optical Disc Factory Facilities and Machinery from Outside the Philippines (e.g., Malaysia and Indonesia)**
- **Significantly Increase Criminal Prosecutions for Piracy in the Philippines, Especially Against OD Plant Owners (Licensed or Unlicensed), Key Mall Operators, and Pirate Book Producers**
- **Ensure that the Optical Media Board (OMB) Develops a Meaningful “Work Plan”**
- **Address Book Piracy, Through Closer Monitoring of Key Areas Selling Pirated Books, Both On and Off University Campuses, and Designate One Government Agency as Responsible for Oversight of Book Piracy Issues**
- **Report on Status of All Copyright Cases, Including Optical Disc Factory Cases, and Information About Disposition of Seized Items in Raids, Including OD Equipment**
- **Provide Greater Funding and Resources to OMB and Customs, Including Optical Disc Forensic Equipment by the Philippine Government**
- **Re-Establish IPR Court, and Develop IP Expertise in Judges and Prosecutors**
- **Address Internet Piracy Threat Through Sustained Actions to Legalize Usage of Copyright Content on the Internet (Internet Cafés as well as Peer-to-Peer Piracy)**
- **Curb Pay TV (Cable and Satellite) Piracy by Shutting Down Some of the Estimated 800 Pirate Cable Systems**

For more details on Philippine’s Special 301 history, see IIPA “History” Appendix to this filing at <http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.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: 2002-2006²

INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level								
Books	49.0	NA	48.0	NA	48.0	NA	45.0	NA	45.0	NA
Business Software ³	35.0	72%	46.0	71%	38.0	71%	33.0	72%	25.0	68%
Records & Music	50.3	62%	21.0	40%	20.0	40%	22.2	40%	20.9	40%
Entertainment Software	NA	NA	11.3	85%	NA	90%	NA	95%	NA	NA
Motion Pictures ⁴	NA	NA	NA	78%	33.0	85%	33.0	89%	30.0	80%
TOTALS	134.3		126.3		139.0		133.2		120.9	

PIRACY UPDATES IN THE PHILIPPINES

Book Piracy: Book piracy in the Philippines remains a major problem, increasingly decimating the market for foreign and domestic book publishers alike. Illegal commercial-scale photocopying of entire books plagues academic publishers. Pirate reprints are common and still being sold under the excuse of a long-ago-repealed compulsory license. Increasingly, “burned” CD-Rs are sold with 100-200 titles on board, and scanned files available for download onto PDAs in hospitals, educational institutions, and even shopping malls are becoming quite common. The Philippines boasts a large number of higher education and graduate students and demand for university textbooks, technical books, and professional medical and nursing books is high. This demand is unfortunately being fulfilled by pirates hawking poor-quality versions, compromising the very educational infrastructure the Philippines government is working so hard to build.

Illegal photocopying most often takes place in commercial establishments surrounding universities or in street stalls concentrated on a single street or small group of streets.⁵ Photocopy shops also operate on campuses, in hospitals, and in medical and nursing schools, often in highly organized fashion, selling door to door to doctors’ offices and medical establishments. These shops avoid holding stockpiles of infringing goods by copying on a “print to order” basis, complicating investigations and enforcement actions. It is disturbing that one set

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2007 Special 301 submission at www.iipa.com/pdf/2007spec301methodology.pdf. For information on the history of Philippines under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

³ BSA’s 2006 statistics are preliminary. They represent the U.S. publishers’ share of software piracy losses in Philippines, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA’s February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

⁴ MPAA’s trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

⁵ 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.

of photocopiers is in operation near the Philippine Regulations Commission, the government institution that 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). Under the able leadership of Superintendent de los Reyes, the PNP has made significant progress in collaboration with right holders on these issues. However, the industry remains frustrated that the good efforts by the PNP and NBI are then hindered by the lack of progress when cases move to the prosecution stage. Judicial reform is imperative to complete the puzzle of effective enforcement.⁶

Since much of the photocopy piracy takes place on or around university campuses, it is important for the Commission on Higher Education (CHED) and the Department of Education (DepEd) to get involved in the issue, especially where on-campus activity is involved.⁷ Recent raids at the Diliman Center at the prestigious University of the Philippines illustrate that activity on campus continues and must be addressed. U.S. publishers have encouraged CHED to provide incentives to campuses that tolerate illegal activity by vendors or students, and consequences (regarding evaluations or funding) for universities that fail to take measures to deter this activity. IIPA will be monitoring measures taken in this regard during 2007.

Apart from the photocopying issue, pirate reprints continue to harm the publishers' market in the Philippines. 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. The National Book Development Board (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."⁸ This declaration is a good start, but must be reinforced by action. Prior to the issuance of this statement, the IPO had 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, the industry remains concerned that the illegal stock has merely moved from the front display area to the back room.

Given the prevalence of optical media product containing book and journal material, publishers have met with OMB about possible collaboration with regard to optical disc piracy. The industry is encouraged by signs of inclusion from OMB. IIPA will be looking for continued willingness by OMB to act on behalf of the industry in 2007.

Books and journals, especially medical and nursing titles, and trade books are increasingly being offered for download onto PDAs by for-profit entities in shopping malls and on medical campuses. Infringers are especially targeting medical students and practical physicians who want easy access to reference titles. This is a dangerous practice that must be stopped immediately.

The Philippines government is working hard to set up a reproduction rights organization (RRO). The National Book Development Board (NBDB), under the direction of Dr. Dennis Gonzalez, has taken charge of this initiative on the government side, and is working with right holders and interested parties to get the RRO underway. The hope is to have universities and

⁶ See *infra* discussion of Multilinks Book Supply case.

⁷ Third party vendors renting space on campuses, for instance, conduct illegal activities with impunity.

⁸ Statement by NBDB Chairman Dennis T. Gonzalez, printed in the *Manila Bulletin*, January 15, 2006.

schools enter into licensing agreements with copyright owners. Book publishers support this effort in principal but warn that it is only one part of the solution to piracy in the Philippines. IIPA welcomes a “plan” but insists that right holders must be involved in the process of establishing terms. In addition, IIPA still 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.⁹

Optical Disc Piracy Still a Key Piracy Concern: Notwithstanding that several optical disc plants were closed in 2006,¹⁰ nine licensed plants and at least one unlicensed plant remain in operation in the Philippines. The nine licensed plants are known to have 31 replication lines and 6 mastering lines (although some of the mastering lines may not be operational). The one additional unlicensed plant was allowed to continue in production since being raided in April 2005 until it was raided again in December 2006. This plant had 8 replicating lines. These plants have an estimated production capacity (at conservative per line/per annum numbers) of 157.5 million discs, well beyond any conceivable rational legitimate domestic demand. There is little authorized production,¹¹ and unfortunately, the capacity to produce optical discs still far exceeds legitimate demand in the Philippines. There remains evidence of pirate optical disc exports to Australia, New Zealand, and Europe, and there is also evidence of the emergence of locally “burned” recordable discs.¹²

A major issue relates to the disposition and whereabouts of machinery that is not licensed and not authorized to be producing discs in the Philippines. For example, two machines from one of the closed plants remained in circulation despite the plant having been ordered to return the machines by the court. The machines still have not, to IIPA’s knowledge, been returned. A formerly registered plant imported a DVD machine which was relocated by the owners without notification to the OMB. Yet another company has had machinery returned to it following a warrant quashal. That plant apparently remains unregistered with the OMB, and indications are this entity has other unregistered replicating machinery as well. There is also hard evidence that a major pirate producer in Malaysia has plans to move its replication lines into the Philippines, and that a known pirate producer from Indonesia has already done so.

⁹ 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.

¹⁰ IIPA knew of eleven plants in existence at the outset of 2006, and knows of five plants having been shut down or closed. However, recent reports indicate that as many as ten licensed plants remain in existence today (nine from previous licensing and one being licensed in 2006 but with no SID Code as of yet); one of the licensed plants was raided in April 2005, but remained in operation until raided again in December 2006. A recent seizure at the border of four second-hand production lines smuggled into the country underscores that production capability is growing or at least holding steady in the Philippines.

¹¹ 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.

¹² For example, between January and October, 2006, the motion picture industry program in the Philippines undertook 3,720 investigations and participated in 153 raids, resulting in the seizure of 260,882 VCDs, 564,601 DVDs, 292,777 CD-Rs, 15,344 DVD-Rs, and 24 CD-R burners. A total of 98 new criminal prosecutions and 658 administrative proceedings were initiated, with 421 criminal cases and 2,041 administrative declarations resolved.

Import Piracy and Mall Piracy: Pirate imports enter the Philippines from Malaysia, China, and Indonesia, continuing to flow into the Philippines feeding the many pirate malls.¹³ One of the major criminal cases in 2006 was tried against importers bringing pirate discs in from Indonesia.¹⁴ Since key mall owners are also in the Philippine Congress, defeating piracy in the malls has been an elusive goal. There has been a marked increase in 2006 in the number of optical discs available in the pirate market coming from China. Entire buildings in the Quiapo Bartertrade area have been refurbished and stalls dedicated to the sale of pirate optical discs imported from China. Many of these stalls specialize in concert DVDs although there has been a significant increase in the sale of Chinese-made movie DVDs as well. The quantities involved indicate regular importations. Additionally, while the Quiapo Barter trade complex is often subject to high profile raid activity by OMB, within 48 hours of a raid, the location is fully stocked and back in full operation. This supply pipeline needs to be addressed with resolute enforcement activity and the barter area shut down permanently.

Signal Theft (Cable and Satellite) a Growing Problem in the Philippines: Signal piracy is a growing problem in the Philippines notwithstanding recent positive statements from the government regarding the problem, 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\$80 million in 2006 (up from \$70 million in losses in 2005) (this translates to 910,000 legitimate Pay TV subscribers, and 887,500 illegal users). The two major concerns are that: small cable television operators (especially in the outer provinces) are moving to the use of pirated programming; and the Philippine 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; quite to the contrary, NTC continues to renew the licenses of rogue operators. IP Philippines and NBI have in recent years cooperated with right holders in carrying out industry raids of pirate operators, but 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.

A Memorandum Agreement (MOA) was recently signed between IP Philippines and the NTC that would establish an administrative enforcement procedure that would enhance investigations of and regulatory action against pirate operators. However, to date there are apparently no implementing regulations on the MOA.¹⁵ Specifically, under the Agreement,

¹³ Sources indicate couriers regularly bring infringing DVDs through Manila airport as checked luggage. Movies, music, software, concert DVDs (bootlegs) are coming in from 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. 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. 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.

¹⁴ On November 13, 2006, Judge Rufino S. Ferraris, Jr. of the Metropolitan Trial Court, Branch 7, Manila, handed down guilty verdicts against two DVD pirates caught smuggling DVDs and labels from Indonesia at the Davao International Airport in 2004.

¹⁵ Alexander Villafania, *NTC, IPOPhil Partner to Tackle Cable TV Piracy*, July 10, 2006, at http://technology.inq7.net/infotech/infotech/view_article.php?article_id=8924. The article notes that

[t]he NTC-IPOPHIL agreement puts into action the enforcement of laws against signal piracy and content copyright infringement not just for the CATV industry but also for the entire broadcasting industry in the country. Under the agreement, the NTC will forward intellectual property

complaints involving alleged intellectual property infringement would be referred to the IPO for determination of that matter alone. Unfortunately, even with the MOA, there has been no real change in the government's policy or actions related to signal theft. The judiciary is also implicated in that criminal complaints remain stalled in courts.

Broadband Has Brought Internet Piracy to the Philippines: With the increased availability of broadband both in homes and Internet cafés in the Philippines in 2006,¹⁶ illegal Internet downloads are becoming more of a threat to legitimate sales and distribution in the Philippines. Motion picture industry representatives have also noticed an increase in hard goods optical disc websites hosted in the Philippines and supplying overseas consumers. The major problem reported by the local music recording association is now illegal loading of pirate music titles to a variety of recording media by dedicated booths and stalls within shopping malls. Here the operators copy MP3 format recordings to mobile telephones, flash drives, recordable optical discs and even computer hard drives. Legitimate sales of musical recordings on optical discs are declining rapidly as a result.

In 2006, the Business Software Alliance noted a drop in the number of online software infringements traced to Philippine ISPs from 5,412 in 2005 to around 3,300 with the infringements being mainly in the peer-to-peer (P2P) domain. In 2006, IIPA is pleased that the Philippine National Police is paying some needed attention to the problem of unlicensed software usage at Internet cafés. IIPA understands that the government of the Philippines is currently considering four Bills to combat cyber-crime, but is unaware of whether these bills concern copyright.¹⁷

End-User Piracy: End-user piracy of business software remains the most serious threat to the business software industry in the Philippines, severely inhibiting the growth of the legitimate market for software. The business software industry has generally been pleased with the Philippine Government's response to calls to enforce against this form of piracy.¹⁸ In 2006, the Business Software Alliance (BSA) worked with two Pilipinas Anti-Piracy Team (PAPT)

infringement cases against cable TV pirates to the IPOPHIL within five days from receipt of complaint. The IPOPHIL would in turn adjudicate the case. IPOPHIL Director General Adrian Cristobal Jr. said both agencies will be coming up with regulatory and enforcement strategies against cable signal piracy, which has been steadily growing in the past few years, largely due to lower cost of cable services and installation of more cable infrastructure ... Joint reports from the Philippine Cable TV Association and the Federation of International Cable TV Association of the Philippines said that the industry's losses on piracy amount to roughly seven billion pesos annually, or about 30 percent of their revenues. Both also stressed that about 1.5 million cable subscribers are illegally connected.

¹⁶ In 2005, the Philippines had one of the fastest rates of growth in the world – well over 100% – in broadband lines. From September 2005 to September 2006, the Philippines was only exceeded in percentage of growth of broadband connectivity by three other countries – Greece, India, and Croatia. The number of broadband connections grew 133.6% in that period. See Vince Chook, *World Broadband Statistics: Q3 2006*, Point Topic Ltd., December 2006.

¹⁷ These are: 1) House Bill No. 1246 (An Act Preventing and Penalizing Computer Fraud, Abuses, and Other Cyber-Related Fraudulent Activities and Creating for the Purpose of Cybercrime Investigation and Coordination Center); 2) House Bill No. 2093 (An Act Defining Cybercrime, Providing for Prevention, Suppression, and Imposition of Penalties); 3) House Bill No. 2528 (An Act Providing Protection Against Computer Fraud, Abuses, and Other Cyber-Related Fraudulent Activities, Providing Penalties Therefor); and 4) House Bill No. 3777 (An Act Defining Cybercrime, Providing for Prevention, Suppression, and Imposition of Penalties Therefor). IIPA is unaware whether any of these relate to copyright, but commends the drafters and the government of the Philippines to the Council on Europe Cybercrime Convention, which contains important provisions on copyright; similar provisions as to all copyright materials (works, software, sound recordings, etc.) should be included in this legislation.

¹⁸ BSA primarily uses the Intellectual Property Rights Division of the National Bureau of Investigation (IPRB-NBI), but also uses the Anti-Fraud and Commercial Crimes Division of the Philippine National Police, Criminal Investigation and Detection Group.

members, i.e., the National Bureau of Investigation (NBI) and the Philippine National Police (PNP), to conduct a record six end-user software piracy actions in addition to seven retail piracy cases in Manila and Cebu.¹⁹ In total, since the crackdown began, Php19 million (US\$369,040) worth of pirated software, computers and servers have been confiscated.

The PAPT also set up a dedicated web site (<http://www.papt.org.ph/>) through which it delivers information on actions it has taken, and also provides a means to receive information from the public on piracy issues. They have proactively sought to get companies to use legal software. For example, the Criminal Investigation and Detection Group's Anti-Fraud and Commercial Crimes Division (AFCCD) of the PNP has started sending out letters signed by Police Senior Superintendent Noel delos Reyes, head of the AFCCD to some business establishments in Cebu City that have been reported to the PAPT website for alleged use of software without proper licenses. In addition, following technical training for PNP officers arranged by BSA in January 2007, the PAPT Technical Inspection Panel (P-TIP) team in the PNP can now assist companies in determining whether the software they are using is licensed or not.

Nevertheless, systemic enforcement problems remain. For example, in one of the raids conducted in November 2006, even where there was overwhelming evidence of the use of unlicensed software, the defendant sought to file a Motion to Quash the search warrant. This is often a common ruse to tie up a case in the legal system.

There were two criminal convictions involving software copyright infringement in 2006 (albeit the cases were commenced more than eight years ago, in 1998):

- Two cases against Nestor Yao (owner of Gains Computer which was raided in 1998). Defendant Yao was sentenced in July 2006 to one year in prison for one case, and three to six years for the other case. The court also required him to pay a total of Php200,000 (approximately US\$4,000)
- The case against Harold Chua, owner of Triac Marketing which was raided in 1998. Mr. Chua was sentenced to one year imprisonment and a fine of Php50,000 (US\$1,000) in 2002.

One administrative case was resolved in favor of the software companies:

- An administrative case against Big Byte in 1997 through the Department of Trade and Industry's Office of Legal Affairs was resolved in October 2006, holding Big Byte's owners liable for copyright infringement and ordering them to pay US\$300.

Nevertheless, delays remain in fully resolving other cases.

¹⁹ In 2005, NBI successfully conducted end user raids against two companies in Manila using pirated and unlicensed software. On August 24, 2005, 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. 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.

- As reported in previous years, the case against Beltron, which was raided in 1995, was resolved in favor of a software company right holder by the Philippine Supreme Court in 2005 – ten years after the initial raid. The issue involved a ruling made by the Department of Justice that Beltron was only civilly liable (as it was a former licensee of Microsoft). The Supreme Court disagreed and ruled in 2005 that Beltron’s officers were liable criminally. Notwithstanding this positive result, the Department of Justice must now file criminal charges before the competent court, the Manila Regional Trial Court, where arraignment of the respondents and criminal trial will ensue. The industry has yet to receive any notice from the court regarding the arraignment of the accused. In effect, they are into the 12th year since the case began.

In addition to this case, there remain cases pending in court, some of which were filed more than a decade ago.²⁰

Camcorder Piracy:²¹ Infringing copies of U.S. motion pictures distributed globally have been forensically linked to illegal copies made on camcorders in Philippine cinemas. An essential element in the fight against such camcorder piracy is the enactment of legislation to prevent the unauthorized operation of audiovisual recording equipment in motion picture theaters while a motion picture is being exhibited. Although in the Philippines, this may already amount to a violation of the copyright law, existing copyright laws have not been used and may not be adequate to combat the “act” of using a camcorder to reproduce a cinematographic film. We urge the government of the Philippines to take whatever steps are necessary to ensure that adequate protection against camcording piracy is reflected in its national legislation.

Organized Crime Links to Piracy: Recent piracy activities in several countries have been linked to organized crime. In a raid on July 27, 2006 on a residential proper in the Taguig suburb of southern Metro Manila, Optical Media Board, Philippine National Police, and Special Action Force officers, in addition to industry representatives, made a disturbing find. In addition to 6,500 pirated DVD movies, optical discs containing pirated copies of Sony PlayStation games, Microsoft Xbox games and MP3 music files, and substantial amounts of hard-core pornographic material, the raiding party also seized several hand grenades, hundreds of rounds of 5.56 mm ammunition, and sachets of a highly addictive and illegal amphetamine derivative known locally as “Shabu” and elsewhere as “ice.” The seized ammunition is of the sort used by high-powered automatic assault weapons and the raiding party immediately notified the Bomb Search and Bomb Disposal Unit of the Philippines National Police, which transported the items to a secure facility. The discovery of dangerous drugs and lethal weapons and ammunition confirms yet again that piracy is frequently linked to other organized criminal activities, what the OMB Chairman even considers a link to terrorism.²²

²⁰ For example, The EKG Computers case arose out of a raid in 1995, and the Pro Data System case arose out of a raid conducted in 1997. Both cases are pending in the regional trial court of Quezon City.

²¹ The vast majority of movies are stolen right off the screen by professional camcorder pirates, who use video cameras to illicitly copy a movie during exhibition in a movie theatre – usually very early in its theatrical release or even prior to the film’s release (e.g., at a promotional screening). Camcorder pirates are often sophisticated criminals and typically sell the master recordings to illicit “source labs” where they are illegally duplicated, packaged and prepared for sale on the black market, then distributed to bootleg “dealers” throughout the world. As a result of camcorder piracy, many motion pictures become available over the Internet – on peer-to-peer networks, file transfer protocol (FTP) sites, Internet Relay Chat (IRC) rooms, or auction sites – as well as on street corners and night markets around the world during the US theatrical release and well before their international debuts.

²² Nini Valera, *OMB Chair Eyes Terrorist Angle in Pirated CDs Raid*, Philippine Daily Inquirer, August 2, 2006, at www.inq7.net.

ENFORCEMENT UPDATES IN THE PHILIPPINES

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2006			
PHILIPPINES			
ACTIONS	MOTION PICTURES	BUSINESS SOFTWARE	SOUND RECORDINGS
NUMBER OF RAIDS CONDUCTED	183	13 ²³	1
NUMBER OF VCDs SEIZED	312,161		80,000
NUMBER OF DVDs SEIZED	878,954		240,000
NUMBER OF CD-Rs SEIZED	328,686		112,000
NUMBER OF INVESTIGATIONS	1,016	13	10
NUMBER OF VCD LAB/FACILITY RAIDS	1	0	1
NUMBER OF CASES COMMENCED	15	1	1
NUMBER OF INDICTMENTS	NA	0	0
NUMBER OF DEFENDANTS CONVICTED (INCLUDING GUILTY PLEAS)	6	2	0
ACQUITTALS AND DISMISSALS	NA	0	0
NUMBER OF CASES PENDING	12	6 ²⁴	1
NUMBER OF FACTORY CASES PENDING	4	0	1
TOTAL NUMBER OF CASES RESULTING IN JAIL TIME		3	0
SUSPENDED PRISON TERMS			
MAXIMUM 6 MONTHS	NA		
OVER 6 MONTHS	NA	2	
OVER 1 YEAR	NA		
TOTAL SUSPENDED PRISON TERMS			
PRISON TERMS SERVED (NOT SUSPENDED)			
MAXIMUM 6 MONTHS	NA		
OVER 6 MONTHS	NA		
OVER 1 YEAR	NA		
TOTAL PRISON TERMS SERVED (NOT SUSPENDED)			
NUMBER OF CASES RESULTING IN CRIMINAL FINES			
UP TO \$1,000	NA		
\$1,000 TO \$5,000	NA	2	
OVER \$5,000	NA		
TOTAL AMOUNT OF FINES LEVIED (IN US\$)	NA	5000	

In general, IIPA notes improved strategies by enforcement authorities, particularly the Optical Media Board, as opposed to ad-hoc responsiveness previously employed.²⁵ However, the OMB's efforts, as laudable as they may be, need to be more consistent and decisive. It appears that through the combination of locally produced factory discs, discs imported from China, and discs "burned" in stores, retail sale of illegal optical discs remains as serious a problem as in previous years. Strict vigilance at the borders²⁶ (especially at the Central Postal

²³ This number includes six end-user software piracy raids and seven retail raids.

²⁴ Four cases are pending in the DOJ and two cases are being litigated in court.

²⁵ In the Philippine government's half-year report, they noted that in January there were 61 inspections/searches, with seizures of 67,725 discs, that in March there were 15 inspections/searches and three plant "audits" and 272,407 discs seized, and that in May there were 155 inspections and 352,748 discs seized.

²⁶ IIPA is heartened by the criminal conviction achieved in November 2006 against two pirate importers of DVDs from Indonesia. On November 13, 2006, Judge Rufino S. Ferraris, Jr. of the Metropolitan Trial Court, Branch 7, handed down guilty verdicts against two DVD pirates caught smuggling DVDs and labels from Indonesia at the Davao International Airport in 2004. Defendants Macacuna Gandarosa and Alinor Pangcatan, residents of Tagum, were caught in the act at the Davao International Airport trying to smuggle in several bags containing 8,200 pieces of DVDs

Clearance Centres) and in the malls will be required. Meanwhile, responses to Pay TV piracy and book piracy remain largely ineffective.

Need Prosecutions Against Pirate OD Plant Owners and Key Mall Operators: A key deficiency in the enforcement system in the Philippines is the failure of the authorities to follow on raids and closures with criminal prosecutions, and thus there is little deterrence against piracy in the Philippines. The OMB, Customs, and other appropriate enforcement authorities must, in addition to continued investigations, raids and seizures, significantly step up arrests. The 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).²⁷ In cases where convictions have already been achieved and sentences meted out, those sentences must be served.

Regarding the optical disc plants, IIPA understands that five plants closed in 2006. This shows a commendable level of effort on the raiding end (two of the plants closed for reasons apparently unrelated to raids), and follows on some activities in 2005 (notwithstanding some problems in those 2005 raids with leaks, etc.).²⁸ Some of the closures may have been related to the administrative cases commenced in 2005 against three plants; *Bright Future*, *Alpha Plus*, and *MHN Optical Technologies, Inc.*²⁹ IIPA urges the U.S. government to request the Philippine

and 16,000 printed labels from Manado, Indonesia on board a Merpati airlines plane on September 23, 2004. They eventually pleaded guilty and the court accepted guilty pleas as to two counts each of violating Sec. 19(c)(1) of Republic Act No. 9239 for knowingly possessing pirated goods with intent to profit, and Sec. 19(c)(2) for importing discs without the necessary import clearance from the Optical Media Board. The sentencing of the two accused occurred on November 29, 2006, and they were sentenced to six months in prison (although we do not know whether there was a fine or whether the sentences were served).

²⁷ The Optical Media Board did take some actions including prosecutions against retailers, but these actions, while commendable, pale in importance to the impact that could be achieved by prosecutions of plant owners and mall financiers. See, e.g., *Cases Filed vs Owners of Counterfeit Items*, BusinessWorld, March 7, 2006 EDIT (describing criminal cases filed before the Department of Justice against the owners of magazine and computer shops which they raided in January 2006 for selling pirated optical discs. The OMB filed these cases based on violations of the Optical Media Act against the owners of Filbar's, Pro-Con Computer Center and Genex Meditech, while the police filed a case against one individual for selling pornographic animation (*anime*) compact discs which is a violation of Article 201 of the Revised Penal Code. The cases stemmed from the simultaneous joint raids conducted by the agents of the OMB and the police's antifraud and computer crimes division of the Criminal Investigation and Detection Group in which over 6,000 pirated CDs, mostly counterfeit copies of several software programs, were confiscated from the three stores. The joint operations by the OMB and PNP were part of the Pilipinas Anti-Piracy Team's activities, as part of the government's campaign to promote awareness of intellectual property rights and curb piracy in the country.

²⁸ 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). 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 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.

²⁹ 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. *Bright Future* was raided again in December 2006, operating unlicensed in the same premises originally licensed by OMB. An effective optical disc law would not permit the re-licensure of a company just convicted for violating the statute, or catching a plant in the act of pirating after its license had been stripped. In the *MHN Optical Technologies, Inc.* matter (OMB Admin. Case Nos. 2005-09-761 and 762), three inspections (on August 12,

government to provide detailed updates, including police reports of raids or administrative actions pursued, seizures as a result, disposition of pirate stock and, importantly, machinery from those plants, follow-up operations, and legal action taken against the owners and operators of those plants. IIPA also urges that OMB invite industry to participate in plant inspections and raids regarding the other licensed plants, and regarding any other plants (i.e., underground plants) being investigated by the Philippine authorities.

In 2007, OMB should immediately commence sustained inspections. The single most effective means of preventing pirate production is plant regulation by means of surprise inspection and rigorous enquiry into plant operation. The OMB has an investigation and inspection department of many people, and it should use these resources primarily to follow its charter which is to regulate optical disc plants. 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.

Regarding the malls, IIPA has noted that many of the pirate vendors in the Virra Mall have moved to Metrowalk, under the same security coordinator as that for Virra Mall. While OMB raided Metrowalk in 2005, we understand that leaks compromised those raids. Cases like Virra Mall/Metrowalk emphasize the need for landlord liability in the copyright law, and also, emphasize the importance of anti-corruption measures to ensure that the government is in fact capable of and will act against piracy enterprises, including the key malls in the Philippines.

No Ex Officio Authority: A major hurdle in the Philippine enforcement system remains the fact that the Police cannot act *ex officio* but must always act in conjunction with the Optical Media Board or on a right holder complaint. This should be remedied, as the Police have resources to devote to the piracy dilemma and wish to be of assistance to the industries, but feel hamstrung and unable to act when the opportunity presents itself. The authority should of course extend to initiating actions and seizing infringing items *ex officio*.

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, 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.³⁰ Prosecuting infringers is an expensive and costly exercise in the Philippines due to the lengthy

September 9, and October 7, 2005) 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. The significant shareholder of this operation, a Hong Kong replication company, is again exporting replicating machinery to entities in the Philippines.

³⁰ For example, it is extremely important in copyright cases to obtain search warrants in a timely manner, and when the Philippines experimented with specialized judges, obtaining a search warrant would normally take 1 to 2 days. However, for the current cadre of judges, it is taking much longer. Even in a recent case in which it took the judge 6 days to issue a search warrant, the result was that the raid was compromised as the target company purchased licensed software prior to the issuance of the warrants. Another known problem is the failure of authorities to seize products not found in the warrant which are clearly infringing. This has led on certain occasions in the past to leaving behind pirate goods, tools and implements at the scene of the crime.

judicial process. While the creation of IP judges or panels in various courts around the country would tend toward resolving many of the issues, there has been no progress since the Supreme Court resolved to defer the creation of special intellectual property courts due to what they considered a “low number” of IP cases.³¹

IIPA has long documented the justice system gone wrong in the Philippines. A prime example of this 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, and all appeals have since been exhausted. To this day, she remains free, and there is evidence that she remains in illegal business activities.³² Based on evidence gathered throughout 2005, the Marquez’ were raided once again on August 3, 2005, and two additional prosecutions were initiated. The availability of the never-ending delay tactics in these cases, and the ultimate failure to date to impose the sentence, 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.³³

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 copyright 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.³⁴ IIPA is pleased that such resources are being devoted to prosecute copyright piracy cases, 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. IIPA also understands that the DOJ Task Force, which is currently led by DOJ Senior Prosecutor Leah Tanodra-Armamento, is formulating guidelines to further streamline and strengthen DOJ procedures on the prosecution of criminal IPR cases. This is certainly a welcomed step if it leads to more and more efficient prosecutions of copyright pirates.

It remains 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 2007.

Irregularities in Enforcement System Must be Resolved: Right holders have in the past experienced irregularities in the enforcement processes 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, and failure to seize infringing items found in inspections. Such irregularities

³¹ IIPA appreciates the fact that IP Phil Director General Adrian Cristobal has stated support for the establishment of specialized IP judges in the Philippines.

³² It appears several government-run universities, hospitals and agencies are still ordering illegal photocopied books from her.

³³ 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.

³⁴ This was accomplished as per Department Order No. 657 s 2005.

in enforcement must be resolved if the government of the Philippines is to be successful in lowering piracy levels.

TRAINING AND PUBLIC AWARENESS

IIPA members provided various public awareness and training activities in the Philippines in 2006. IIPA participated in a seminar entitled "Copyright in the Knowledge Economy: Challenges, Emerging Issues and Future Prospects," sponsored by the Commercial Law Development Program (CLDP), the U.S. Patent and Trademark Office, the Philippine Government, and WIPO, held from September 11-14 in Manila. The motion picture industry participated in five training sessions in the Philippines in 2006. The book publishing industry has also participated in several training sessions and is also developing a website addressing availability of legitimate product, especially in the provincial areas of the country. The business software industry also participated in training and seminars in the Philippines as follows:

- IPR Protection Training Program Organized by Philippine IP Office and BSA, April 26, 2006. Audience: Officers From IPO and Other Enforcement Bodies.
- "A Safe And Legal Digital World," April 17, 2006 – Venue: Microsoft Office, Makati City; Audience: School Officials (20 Attendees); Seminar Organized by Cyberfair Philippines.
- IP Training for Judges organized by the Philippines Judicial Academy (Philja) and IP Philippines in November 2006. The purpose of the course was to provide judges in commercial courts with a more in-depth knowledge on intellectual property law as well as develop the skills necessary to apply the said knowledge to resolve frequently raised issues in cases before Philippine courts. Business Software Alliance (BSA) members participated in this training.
- Technical training on software licensing for five Philippine National Police officers arranged by BSA on January 31, 2007 in order to form the PAPT Technical Inspection Panel (P-TIP) team.

There has also been a concerted effort to develop judges' and prosecutors' expertise on intellectual property rights. There have been seminars and lectures undertaken by both IP Philippines and the Philippine Judicial Academy. A number of private entities and associations have also invited judges and prosecutors to their seminars. The motion picture industry ran a training course for the Thai CIPIT and Thai Supreme Court in June 2006 and had Judge Antonio Eugenio, of the Manila Regional Trial Court provide a presentation on the IP judicial process in the Philippines, where he also covered (lamented) how defendants can use the system to stall or stymie judicial enforcement efforts.

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.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 2006.³⁶

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

IIPA Supports Passage of House Bill 3308/3320: As has been noted in our submissions to the Philippine government (of November 2005 and September 2006), IIPA strongly supports passage of H.B. 322/3308 (and the corresponding legislation in the Senate). This legislation would, if passed, 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 and online environments.

One of the principal achievements of the Bill is that it would result in full and proper implementation of the WIPO “Internet” Treaties, the WCT and WPPT. The Philippines’ current Intellectual Property Code was enacted in 1997 and, due in part to the proliferation of copyright materials on the Internet, the current Code is no longer able to sufficiently protect and preserve the nation’s Intellectual Property. The Bill would update and expand the scope of copyright protections for the digital and online world and allow authorities in the Philippines to successfully combat Internet piracy. In particular, the legislation would expand the scope of the reproduction right 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 also provides critical protections against circumvention of “technological protection measures” and protections against unlawful tampering or use of “rights management information.”

The Bill would establish a world-class copyright legislation, both in areas of substantive protection and enforcement. The Bill’s improvements include (a) increasing the term of protection for works and sound recordings in line with international trends, (b) providing an importation right, (c) narrowing certain exceptions, (d) providing for Berne and TRIPS-compatible protection for pre-existing works, (e) providing criteria for secondary liability (e.g., creating liability for landlords who lease stalls to pirates in malls), (f) criminalizing end-user piracy of business software, (g) providing for a Berne and TRIPS-compatible presumption of ownership to ease burdens on right holders when enforcing their rights, (h) strengthening border measures, (i) providing for *ex parte* civil searches as required by TRIPS, (j) providing for disclosure of information to right holders to assist in investigations of infringement, (k) allowing

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.

“sampling” to efficiently deal with massive seizures of pirated materials, and (l) 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/claimant. All of these improvements together, if passed and implemented, will result in one of the best and most effective copyright laws in the world.

Philippine creators and society stand to gain much from the passage of a strong copyright law and adequate copyright enforcement. Indeed, Philippine President Gloria Macapagal Arroyo has said as much in her recent speech to mark the U.S. Trade Representative’s recognition of the Philippines’ improved standing on IPR, stating:

“[W]hile we appreciate the U.S. government’s recognition of our efforts to protect intellectual property rights, we mustn’t lose sight of the fact that protection of IPR is first and foremost in the interest of the Filipino people.”

In the 1990s, the music markets in several Asian countries/territories, including the Philippines, saw enormous growth in the market share for local music; it is no coincidence that such changes occurred just as these countries/territories adopted better copyright laws and saw increases in enforcement activity.³⁷ A study of the Business Software Alliance and IDC estimates that for the Philippines, a 10-point reduction in the current 71% piracy rate would yield additional US\$25 million (Php1.3 billion) in tax revenues and US\$470 million (Php 25.3 billion) to the economy, create 2,200 new IT jobs and increase local vendor revenues by US\$325 million (Php 17.5 billion).³⁸ Other creators in the Philippines, e.g., film makers like Gerardo De Leon,³⁹ Ishmael Bernal,⁴⁰ Eddie Romero,⁴¹ and film producers like Pia Clemente who in 2006 became the first ever Filipina nominated for an Academy Award for producing the comedy short *Our Time is Up*;⁴² writers like Nick Joaquin,⁴³ Edith Tiempo,⁴⁴ and Virgilio Almarino;⁴⁵ musicians

³⁷ Local market share in the Philippines, Taiwan, Indonesia, Korea, and Hong Kong all increased in the 1990s. The domestic music industry in the Philippines made up 42% of the market in 2000, up from 30% in 1998. The international music market declined in the Philippines for this same period from 67% to 57%. See IFPI, 2001: The Recording Industry in Numbers 86-110 (2001). In Taiwan, local music represents a substantially larger percentage of the market than international music, 66% vs. 28% in 2000 (and local market share in Taiwan has increased since 1991, from 60% to 66%). In Korea, for example, domestic recorded music made up 63% of the market in 2000, up from 49% in 1991, correlative in part to stronger copyright protection in Korea.

³⁸ See *New BSA study shows that Philippines’ Emerging IT Sector Could Nearly Double in Size by 2009*, December 8, 2005, at <http://www.bsa.org/philippines/press/newsreleases/IDC-Study.cfm>.

³⁹ In the 50s and 60s, he produced many films that are now considered classics including "Daigdig ng Mga Api," "Noli Me Tangere," "El Filibusterismo," and "Sisa." Among a long list of films are "Sawa sa Lumang Simboryo," "Dyesebel," "The Gold Bikini," "Banaue," "The Brides of Blood Island." See http://www.ncca.gov.ph/about_cultarts/cultprofile/natarts/cinema/deleon.php.

⁴⁰ Among his notable films are "Pahiram ng Isang Umaga" (1989), "Broken Marriage" (1983), "Himala" (1981), "City After Dark" (1980), and "Nunal sa Tubig" (1976). See http://www.ncca.gov.ph/about_cultarts/cultprofile/natarts/cinema/bernal.php.

⁴¹ See http://www.ncca.gov.ph/about_cultarts/cultprofile/natarts/cinema/romero.php ("Eddie Romero, is a screenwriter, film director and producer, is the quintessential Filipino filmmaker whose life is devoted to the art and commerce of cinema spanning three generations of filmmakers").

⁴² The Philippines has a rich tradition of motion picture production, including the films of the late Lino Brocka.

⁴³ Among his voluminous works are *The Woman Who Had Two Navels*, *A Portrait of the Artist as Filipino*, *Manila*, *My Manila: A History for the Young*, *The Ballad of the Five Battles*, *Rizal in Saga*, *Almanac for Manileños*, *Cave and Shadows*. See http://www.ncca.gov.ph/about_cultarts/cultprofile/natarts/literature/joaquin.php.

⁴⁴ Tiempo’s published works include the novel *A Blade of Fern* (1978), *The Native Coast* (1979), and *The Alien Corn* (1992); the poetry collections, *The Tracks of Babylon and Other Poems* (1966), and *The Charmer’s Box and Other Poems* (1993); and the short story collection *Abide, Joshua, and Other Stories* (1964).

See http://www.ncca.gov.ph/about_cultarts/cultprofile/natarts/literature/tiempo.php.

⁴⁵ Among his 10 books of criticisms and anthologies are *Ang Makata sa Panahon ng Makina*, *Balagtasismo versus Modernismo*, *Walong Dekada ng Makabagong Tula Pilipino*, *Mutyang Dilim* and *Barlaan at Josaphat*. See http://www.ncca.gov.ph/about_cultarts/cultprofile/natarts/literature/almario.php.

like Antonio Molina,⁴⁶ Jose Maceda,⁴⁷ and Ernani Cuenco,⁴⁸ as well as those involved in entertainment software development,⁴⁹ all stand to reap the benefits of better copyright protection in the Philippines.

IIPA Views on “IP Philippines Comments and Recommendation”: IIPA has reviewed the “IP Philippines Comments and Recommendation” on H.B. 322/3308. Overall, IIPA is pleased that IP Philippines agrees with many of the Philippine government-proposed amendments in H.B. 322/3308, especially in the area of copyright enforcement. The changes proposed in H.B. 322/3308 will enhance IP Philippines’ and other competent authorities’ ability to bring enforcement actions against piracy in the Philippines, and it is hoped that many such actions will occur, in conjunction with a greater focus on judicial enforcement, particularly through criminal prosecutions where warranted, leading to reductions in the overall piracy level in the Philippines in years to come.

At the same time, IIPA believes that many of the IP Philippines recommendations, if implemented, would result in weakening the House Bill in significant respects, and would result in lack of clarity on other respects. Some changes being proposed in H.B. 322/3308 would not only result in the failure of the Philippines to fully implement the WCT and WPPT but would potentially place the Philippines at risk of violating its international obligations. The following summarizes some of IIPA’s comments on some key provisions in which IP Philippines has proposed changes to the House Bill.

- **Temporary Copies:** H.B. 322/3308 would result in express protection for temporary copies under the reproduction right in the Philippines. However, the IP Philippines recommends removing the word “temporary,” thereby muddying the provision, while explicitly adopting language from an “Agreed Statement” to the WCT/WPPT. While the “Agreed Statement[s]” by their intention and meaning should clearly result in coverage of temporary copies, the IP Philippines does not make this clear, instead indicating in Comments that because “[t]he proposed amendment aims to make the definition of reproduction applicable to the digital environment,” the word “temporary” should not be adopted. The IP Philippines Comments leave it unclear whether temporary copies would be covered under their formulation. Many experts have noted that these Agreed Statements concerning the reproduction right were adopted to clarify that “storage” in a digital medium, regardless of the duration of such storage, qualifies as “reproduction,” consistent with the definition of reproduction under Article 9(1) of the Berne Convention, which extends to reproduction “in any manner of form.” This means that the concept of reproduction as an exclusive right of an author must not be restricted just because a reproduction is in digital form, in storage in an electronic memory, or of a temporary nature. Thus, to avoid unnecessary ambiguity, the word “temporary” should be retained as the clearest and most succinct way of expressing the intent of the

⁴⁶ Among his compositions are Hatinggabi, a serenade for solo violin and piano accompaniment. Other works are (orchestral music) Misa Antoniana Grand Festival Mass, Ang Batingaw, Kundiman- Kundangan; (chamber music) Hating Gabi, String Quartet, Kung sa Iyong Gunita, Pandanguhan; and (vocal music) Amihan, Awit ni Maria Clara, Larawan Nitong Pilipinas. See http://www.ncca.gov.ph/about_cultarts/cultprofile/natarts/music/molina.php.

⁴⁷ Among his compositions are Ugma-ugma (1963), Pagsamba (1968), and Udlot-udlot (1975). Other major works include Agungan, Kubing, Pagsamba, Ugnayan, Ading, Aroding, Siasid, Suling-suling.

See http://www.ncca.gov.ph/about_cultarts/cultprofile/natarts/music/maceda.php.

⁴⁸ His songs and ballads include "Nahan, Kahit na Magtiis," and "Diligin Mo ng Hamog ang Uhaw na Lupa," "Pilipinas," "Inang Bayan," "Isang Dalangin," "Kalesa," "Bato sa Buhangin" and "Gaano Kita Kamahal." See http://www.ncca.gov.ph/about_cultarts/cultprofile/natarts/music/cuenco.php

⁴⁹ See IT Matters, <http://www.itmatters.com.ph/features.php?id=090705b>, Sept. 7, 2005 (an article about a Philippine company ArtFarm, which partnered with Tokyo-based software organization Software Partnership International Japan, through its president, Katsumi Yamaguchi, to develop content for video games).

Agreed Statements. The global trend roundly demonstrates that temporary copies are recognized as part of the reproduction right.⁵⁰ Covering temporary copies is a priority issue for the copyright industries.

- **Technological Protection Measures (TPMs):** H.B. 322/3308 importantly provides critical protections against circumvention of “technological protection measures.” The IP Philippines recommends minor changes to the definition of TPMs, and as long as it is confirmed that access controls are covered, IIPA has no problem with the proposed changes. The IP Philippines suggests, however, deletion of one of the three criteria of showing that trafficking in circumvention devices has an unlawful purpose, namely, the deletion of the phrase “have only a limited commercially significant purpose or use other than to circumvent any effective technological measure” in proposed Section 229 A.1(b)(ii). The IP Philippines’ stated purpose in such deletion is “in order not to hold liable any person who does not have any intent to commit infringement or circumvent the technological protection measures.” IIPA wants to emphasize that the purpose of Section 229 A.1 (b)(ii) is not to hold someone who does not intend to circumvent technological safeguards liable, rather this section seeks to take into account *objective evidence* indicating that devices or services have the improper purpose to descramble, decrypt, or otherwise circumvent technological safeguards. The point of the provision IP Philippines proposes deleting is that if the prohibited purpose (or intent) cannot be directly proven (for instance, through the words of the defendant or its agents), then it may be indirectly proven in the fact that a device or service has only a limited commercially significant purpose or use other than to circumvent. This criteria permits the manufacture and sale of legitimate consumer electronics and home computer equipment that are not meant to circumvent, but should be sufficient to catch those in the business of providing the means to defeat technological protection measures. In order for the provisions against circumvention to be effective as required by Article 11 of the WCT and Article 18 of the WPPT, the phrase “have only a limited commercially significant purpose or use other than to circumvent any effective technological measure” must be retained. Adequate and effective protection of technological measures is an essential element of the Philippines legal framework for copyright into the future.
- **Terms of Protection:** H.B. 322/3308 would provide for extended terms of “life plus 70” years for those whose term is calculated based on the life of the author, and “95 years” from publication (audiovisual works) or from the performance or recording (for performers and sound recording producers, respectively). The IP Philippines states several reasons that extending term in the Philippines “is not necessary.” However, the international trend is clear, since 82 countries now provide, have committed to provide, or are expected to commit to provide, more than the Berne/TRIPS minima of 50 years pma or 50 years from publication for cinematographic works or sound recordings.⁵¹ Recent enactments in many countries/territories, both developed and developing, mark the unmistakable trend toward extension of the term of copyright protection beyond the existing TRIPS minima. As cross-border transmissions become the norm, it is important for the Philippines to harmonize in this area so that the Philippines’ shorter term does not become an irritant in relationships with the majority of countries that have longer terms. Extending term will also afford Philippine creators whose works are getting close to the end of their terms in the Philippines

⁵⁰ Aside from the Philippines, as of August 14, 2006, at least 96 countries/territories provided protection for temporary copies as part of the reproduction right either explicitly or by interpretation, or had committed, through the EU Information Society Directive or through an FTA with the U.S., to do so, or had draft legislation pending which would provide such protection.

⁵¹ For example, all but 5 of the 82 countries provide or will provide a term greater than “life plus 50” for authors, and 73 of the 82 provide at least “life plus 70” for authors.

a chance to reap continuing economic benefits (i.e., due to longer life expectancies, it is reasonable to grant such Philippine creators longer terms).⁵² Since the duration of protection for films and sound recordings are calculated differently than other works, the economic benefit to those creating such works is translated into the actuarial equivalent,⁵³ which is 75 years (related to “life plus 50”) and 95 years (related to “life plus 70”).⁵⁴ Thus, the House Bill should be accepted, and the Philippines should agree to protect works for the life of the author plus 70 years, or 95 years from publication in the case of sound recordings, cinematographic works, works whose author is a legal entity, and other works whose term is measured from publication.⁵⁵ Term extension is an absolutely essential issue for the copyright community whose authors are living longer and whose right holders rely on harmonized terms in order to fully enjoy their copyrights and foster further development of copyright through more creation and more resources to widely disseminate their creations.

- **Liability of Mall Landlords Benefiting from Premises Where Piracy is Occurring:** H.B. 322/3308 would bring the concept of indirect liability into the Philippine Copyright Act, with the specific aim of holding landlords who permit lessees conducting pirate business on their premises liable for copyright infringement.⁵⁶ The IP Philippines has deleted the indirect liability language from its proposal. If IP Philippines is serious about reducing piracy domestically, especially that found in the malls, it will reinstate the indirect liability language, at least to ensure that landlords can be held liable when they are aware of and facilitate infringement, or when they can control and financially benefit from infringement. This provision is an essential aspect to the fight against mall piracy in the Philippines.
- **Reprographic “Reproduction” Exception for Libraries:** H.B. 322/3308 would appropriately narrow the exception for reprographic reproduction to a single copy by the National Library or the Supreme Court, and only to the extent the work is not commercially available on reasonable terms. IP Philippines is proposing changes to the Bill and to the current Act that would go well beyond what is currently allowed under the law and may run

⁵² See, e.g., the writings of Claro Mayo Recto (1890-1960), one of the Philippines’ major writers, which would go into the public domain in 2010 unless term is extended. The works of Zoilo Galang (1895-1959) would enter the public domain in 2009. The recordings of Philippine composer Eliseo Pajaro’s music (including award-winning operas and ballet) would be getting close to the end of their terms, unless term is extended. The works of Manuel Arguilla (1910-1944) (e.g., *How My Brother Leon Brought Home A Wife (And Other Stories)*) and award-winning poet Cecilio Apostol (1877 – 1938, e.g., *A’ Rizal (To Rizal)* and *Mi Raza (My Race)*) have already entered the public domain in the Philippines, but if term is extended and recapture is permitted, the families of these authors can enjoy the benefits of their creations for several more years. The works of Amado V. Hernandez (1903-1970) (*Isang Dipang Langit*; he was named a “National Artist for Literature”) and others would enter into the public domain sooner than they would if term extension is enacted, benefiting these authors’ families for the intended period (due to increasing life expectancies).

⁵³ The IP Philippines indicate there is no “coherent reason” to have 95 years, but indeed, an “actuarial equivalent” is a perfectly coherent reason.

⁵⁴ Movies like Lamberto Avellana’s award-winning *Anak Dalita (The Ruins)* (1956), the stark tragedy of post-WWII survival set in Intramuros, would fall into the public domain this year without term extension, and his award-winning *Kundiman ng lahi* (1959) will fall into the public domain without term extension, depriving his heirs of any possible economic benefit. Award winning films like *Genghis Khan* (1952), Manuel Conde’s movie, which was accepted for screening at the Venice Film Festival, fell into the public domain due to lack of term extension, depriving the heirs that movie of the intended economic benefits of copyright. Gerardo de Leon’s award-winning *Ifugao* (1954) similarly fell out of protection in 2004. See *History of Philippine Cinema*, Onlineessays.com.

⁵⁵ IIPA also proposes the elimination of a still remaining formal conflict with Article 9 of the WCT concerning the term of protection of photographic works.

⁵⁶ Specifically, one could be held liable for “direct” infringement (including one who “causes an infringement to be committed”), vicarious liability (one who “benefits financially from the infringing activity of another person who commits an infringement if the person benefiting has the right and ability to control the activities of the other person”) and contributory liability (finding liability when one “enables or induces infringement by another person enabling or inducing the infringement has or reasonably should have knowledge of it and materially contributes to it”).

afoul of the Berne three-step test for judging whether an exception to protection is permissible under that international convention to which the Philippines is a party. Namely, the IP Philippines proposed changes, if adopted, would result in the exception not limiting the number of copies that can be made (the House Bill, like the current Act, limits reprographic copies to “a single copy”) and in an expansion of the exception to reproductions beyond “reprographic” copies, i.e., to digital copies as well as analog copies. Finally, while the House Bill would limit the exception to the National Library or the Supreme Court, the IP Philippines proposal would broaden the exception to cover any library or archive (to make such copies as long as such copies are “not for profit” regardless of the amount of harm caused to a legitimate right holder or the interference with the right holder’s normal exploitation of the work). These suggested changes are incompatible with the Philippines international obligations, would cause severe harm to right holders, and should be rejected.

- **Limitations and Exceptions in General:** IIPA proposes a systematic approach to exceptions and limitations in the IP Code and in H.B. 322/3308, which would consist, on the one hand, in the extension of the application of the “three-step test” to all limitations on and exceptions to copyright provided for in Chapter VIII, and, on the other hand, in extending, in a *mutatis mutandis* manner, the application of copyright limitations and exceptions to related rights (applying the technique of Article 17 of the WPPT). These proposed modifications offer a fuller guarantee for compliance with international norms.
- **Importation Right:** H.B. 322/3308 would clarify the existence of an exclusive “importation” right covering both piratical imports as well as parallel imports not authorized by the local Philippine right holder, which may also be deduced from the existing norms, in particular Subsection 190.1 of the IP Code. With increasing cross-border transactions in pirated copyright materials, as well as the unauthorized importation of pirated goods across borders (or pirated goods disguised as parallel imports), such a right is essential to fight piracy and to protect the investments of local Philippine licensees who have purchased the exclusive right to distribute a copyright product in the local market. The drafters are to be commended for confirming the recognition of this important right. IP Philippines has asked for “clarification” of the intention of the drafters in what it refers to as “adding” a full “importation” right,⁵⁷ and is arguing for “international exhaustion.” However, there are compelling reasons the Philippines should maintain a full importation right. For example, many economists agree that allowing copyright owners to control parallel imports is a necessary condition for realizing creativity-enhancing benefits, and economic evidence supports the view that controls on unauthorized imports in the exercise of intellectual property rights are under most conditions pro-competitive in that such restraints not only reduce “free riding” on pre-sales marketing and after-sales maintenance by unauthorized distributors, but also contribute to the growth of local copyright-based industries and related infrastructure.⁵⁸ Contrary to IP Philippines’ argument (that an importation right covering parallel imports “could have great implications on access to works such as books as well as undermining free competition and trade”), the recognition of an importation right in the Philippines and elsewhere will ensure that right holders, including publishers, can make works available on reasonable terms, consistent with the level of development in each market, without fear that products sold at a lower price in the Philippines, for example, will not find their way back into

⁵⁷ IP Philippines states that an importation right “could have great implications on access to works such as books as well as undermining free competition and trade.”

⁵⁸ See, e.g., Claude E. BARFIELD, *The Economic Case for Copyright Owner Control Over Parallel Imports*, *Journal of World Intellectual Property* 1 (6) (1998), 903-939.

higher price markets. Such protection will in fact insure that there remain reasonably priced books in the Philippine marketplace.⁵⁹

- **Other Comments:** One provision in need of clarification is the exclusivity of the “making available” right in the context of related rights so that it is clear that the right of remuneration in Section 209 of the current IP Code does not and will not apply to acts of “making available” a sound recording or performance. The easiest way to accomplish this is to modify Section 209 to expressly provide that it shall not disturb the exclusivity in the “making available” right (proposed Section 208.4 and existing Section 203.5). Another way to approach the problem is by amending Section 202.9 (the definition of “communication to the public” in the context of related rights) to add to the end of the first sentence of Subsection 202.9: “and other than making them available to the public... .”

Quezon City to Become “IP City”: It is laudable that the Mayor of Quezon City has determined that Quezon will be “IP City.” In order to achieve his objectives of fostering legitimate IP, the Mayor pushed for passage of a City Ordinance addressing the shortcomings of its previous anti-piracy ordinance, and is currently setting up an IPR Unit to handle complaints involving IPR violations within his jurisdiction.

Free and Open Source: House Bill 5769, otherwise known as the “free and open source software” Bill, aims to mandate the use of open source software in all government agencies, including public schools, instead of proprietary software applications. IIPA is strongly opposed to many provisions in this Bill, which would shatter the government’s current policy of technology neutrality.

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 2005, \$1.0 billion worth of Philippine imports to the United States benefited from the GSP program, accounting for 10.9% of its total exports to the U.S. During the first 11 months of 2006, \$1.1 billion worth of Philippine goods (or 11.8% of the Philippines’ total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code.⁶⁰ 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.⁶¹

⁵⁹ Further, Section 190 of the current Act already implies an importation right, i.e., a right to authorize or prohibit imports into the Philippines, since it exempts personal use importations (3 copies) from being considered infringement (i.e., 4 copies is considered infringement), and Section 190.3 provides that Customs must have the ability of “preventing” illegal importations under the Act as well as “under treaties and conventions to which the Philippines may be a party” (including TRIPS Article 51 and Berne Article 16).

⁶⁰ 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.

⁶¹ 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”).