

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

PHILIPPINES

Special 301 Recommendation: The Philippines should remain on the Watch List, but IIPA recommends that USTR conduct an out-of-cycle review (OCR) to monitor very closely several developments of vital interest to the copyright industries:

1. Achieve Progress in Piracy Cases: IIPA expects to see progress in terms of greater numbers of criminal prosecutions against key mall operators, pirate book producers, and large-scale pirate distributors, and hopes for progress on court cases that are currently pending in the system. As an example, IIPA requests well-documented and good faith efforts to be made to locate and arrest fugitives (such as convicted medical book pirate Catherine Marquez).

2. Address Mobile Device Piracy: The government must take strong and effective enforcement actions against shops and dealerships involved in loading unauthorized copies of sound recordings and other copyright materials onto mp3 players, mobile phones and other such devices. The practice is blatant and growing rapidly.

3. Address Publishers' Concerns with Collective Licensing and Fair Use Guidelines: Any move toward establishing a collective licensing model in the Philippines must at a minimum include an open and transparent consultation process with all (foreign and domestic) affected right holders regarding the parameters for any such organization. If there is to be such a licensing society at all, its practices must conform to the criteria set forth in this filing for any such organization. The Philippine government must also engage in a transparent consultation process regarding any developments toward the adoption of fair use guidelines.

IIPA will be monitoring developments in these areas closely and will take both the processes and their results into consideration when commenting in the out of cycle review.

EXECUTIVE SUMMARY

In February 2006, the United States Trade Representative decided to lower the Philippines to the Watch List based on promises made by the Philippine government that it would improve its IPR protection. Throughout 2006 and into 2007, IIPA members noted a marked increase in raiding and seizures, accompanied by several plant closures, and focusing on physical piracy and optical discs. Some criminal copyright cases even proceeded to judgment, albeit that these cases targeted small-scale pirates.¹ The progress seen has unfortunately waned in 2007. The copyright piracy situation on the ground has gradually gotten worse, including the digital piracy phenomena such as mobile device piracy (in which pirate files are loaded onto mobile devices or memory carriers), Internet download piracy, and camcording piracy of motion pictures in the movie theaters (which has seen an alarming rise in 2007). Book piracy, CD-R/DVD-R burning retail and mall piracy, and Pay TV piracy, remain significant barriers to legitimate copyright commerce in the Philippines.

¹ The Philippine government has made some efforts to coordinate intellectual property enforcement, as highlighted most notably in its March 2007 report, *Strengthening the IP System: The Campaign Against Piracy and Counterfeiting in the Philippines (2005-2006)* (Comment of the Government of the Republic of the Philippines submitted to the United States Trade Representative's Office in relation to the 2007 Special 301: Philippines), at http://www.ipophil.gov.ph/pdf_format/GRPComment2007.pdf. Statements from the President of the Philippines also indicate a desire to make progress and see a path past an age where the market is dominated by piracy. See *id.* (reporting a Philippine Star article of March 11, 2007, at 4, in which President Gloria Macapagal-Arroyo lectured Quiapo traders who peddle pirated DVDs, VCDs and videogames, quoting the President as stating, "Piracy is a crime. It's against the law. That's why I'm offering alternative means of livelihood for you and your families").

IIPA was heartened to see the letter memorandum issued by President Gloria Macapagal Arroyo on November 16, 2006 to IP enforcement agencies in the Philippines entitled “Sustaining Our Gains In Protecting Intellectual Property Rights.” We believe this letter and its various directives strike the right tone for making real progress in the fight against piracy, and the priority actions for 2008 listed below in many respects mirror what the President has directed. Somewhat less helpful for copyright owners are the Strategic Plan (2007-2009) (published in February 2007)² and the “Philippines Intellectual Property Policy Strategy” (PIPPS) issued by the Intellectual Property Office of the Philippines (IP Philippines). The first document is disappointing in that there is not much focus on copyright, and the goals are seemingly designed with a political aim in mind (i.e., to get off the Special 301 list) rather than to be helpful to creators.³ The PIPPS lacks specificity and only two of eight objectives deal with copyright (“copyright and other creative industries” and “capacity-building and heightened IP enforcement”).

In the meantime, real enforcement problems continue to plague right holders. There remains a paucity of criminal actions against large-scale producers and distributors, who remain largely untouched. Further, irregularities like compromises in raids and leaks make deterrent enforcement impossible to achieve.⁴ Two cases, *Telmarc Cable*, in which a warrant was quashed on similar grounds to the *Solid Laguna* case in 2005 (i.e., lack of “personal knowledge” of the warrant officer of the infringement), and *Tamano*, in which the Secretary of the Department of Justice misinterpreted the law in finding no broadcast right under the Philippine Copyright Act, cast doubt on whether the Philippines remains in compliance with its current international obligations. Legislative proposals, which would raise the standards of protection in the Philippines to the highest international levels, show no signs of progressing toward passage.

PRIORITY ACTIONS REQUESTED IN 2008

- **Increase the number and magnitude of criminal prosecutions against key mall operators, pirate book producers, large-scale pirate distributors, and other key pirates (e.g., optical disc plant owners).**
- **Investigate compromises in enforcement actions and leaks or other irregularities.**
- **Employ resources to locate and arrest fugitives (such as convicted pirates like book pirate Catherine Marquez).**
- **Address book piracy through closer monitoring of key areas selling pirated books, both on and off university campuses.**
- **Re-establish an intellectual property court, and develop IP expertise in judges and prosecutors. Increase vigilance in prosecutions, moving a significant number of pending cases forward in the system.**
- **Take strong enforcement actions against mobile device piracy.**
- **Curb Pay TV (cable and satellite) piracy by shutting down some of the estimated 800 pirate cable systems, and/or through license or permit revocations/suspensions.**
- **Update/amend copyright law to ensure it is in compliance with all of the Philippines international obligations, and is modernized to deal with digital and Internet piracy.**
- **Ensure search warrants are obtainable on a reasonable basis consistent with international law.**

²Intellectual Property Office of the Philippines, *Strategic Plan: 2007-2009 Back to Basics*, February 20, 2007, at <http://ipophil.gov.ph/>.

³ One of the self-stated “performance criteria” of IP Philippines is to “lead[] the efforts on removing the Philippines from the US Special 301 Priority Watch List (downgraded to Ordinary Watch List).”

⁴ Leaks and other irregularities stymied an estimated 30% of all planned enforcement actions in 2007.

For more details on Philippine's Special 301 history, see IIPA "History" Appendix to this filing at <http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.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: 2003-2007 ⁵										
INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level								
Books	49.0	NA	49.0	NA	48.0	NA	48.0	NA	45.0	NA
Business Software ⁶	75.0	71%	71.0	71%	46.0	71%	38.0	71%	33.0	72%
Records & Music	88.3	80%	50.3	62%	21.0	40%	20.0	40%	22.2	40%
Entertainment Software	NA	NA	NA	NA	11.3	85%	NA	90%	NA	95%
Motion Pictures	NA	NA	NA	NA	NA	78%	33.0	85%	33.0	89%
TOTALS	212.3		170.3		126.3		139.0		133.2	

PIRACY UPDATES IN THE PHILIPPINES

Book and Journal Piracy: Book and journal piracy remain significant problems, affecting foreign and domestic publishers alike. Illegal commercial-scale photocopying of entire books continues, in commercial establishments surrounding universities, or in street stalls in metropolitan areas.⁷ Photocopy shops also operate on campuses,⁸ 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.⁹ Increasingly, pirates burn CD-Rs sold with up to 100-200 titles burned onto each disc, or scan files available for download onto PDAs in hospitals, educational institutions, and even shopping malls (see discussion below regarding mobile device piracy).

Since much of the pirate photocopying takes place on or around university campuses, it is important for the Commission on Higher Education (CHED) to get involved in the issue.¹⁰ 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 do not tolerate illegal activity by vendors or students, and consequences (regarding evaluations or funding) for universities that fail to take measures to deter this activity.

Apart from the photocopying issue, publishers remain concerned about illegal reprints of textbooks and medical books. In the past, some 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

⁵ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2008 Special 301 submission at www.iipa.com/pdf/2008spec301methodology.pdf.

⁶ BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Philippines, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.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 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

⁷ 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.

⁸ The Philippines boasts a large number of higher education and graduate students and while as a result, demand remains high for university textbooks, technical books, and professional medical and nursing books, unfortunately, pirates fulfill the demand hawking poor-quality photocopies.

⁹ It is disturbing that one set of photocopiers is in operation near the Philippine Regulations Commission, the government institution that regulates professional businesses in the country.

¹⁰ Third party vendors renting space on campuses, for instance, conduct illegal activities with impunity.

under R.A. 8295.”¹¹ This declaration was 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 backroom.

Mobile Device Piracy: The Philippines is experiencing rapid and very problematic growth of mobile device piracy – whereby illegal vendors set up dedicated booths and stalls within shopping malls and load pirate content (music, published materials, etc.) onto mobile telephones, MP3 devices, flash drives, recordable optical discs, and even computer hard drives. These downloads onto mobile devices occur prior to sale as an added incentive or after sale, or are offered as a service alone, as “download for a fee.”

During the last few months of 2007 and early 2008, the international recording industry group, the International Federation of Phonographic Industries, working with the local music recording industry association (PARI), conducted market surveys of this phenomenon and provoked enforcement actions against a chain of computer dealerships actively involved in direct loading to iPod music player devices at the point of sale. (A criminal case is being filed against the operators of the computer retail chain.) Test purchases were made from every branch of the chain, and in all instances staff loaded infringing musical works on the purchased devices, many hundreds of tracks being provided to the investigators in this way. Instances of this kind of activity are ubiquitous, and several electronic goods and mobile telephone outlets have been surveyed and MP3 player devices have been purchased, both pre-loaded at point of sale, or the same devices have then been further downloaded with infringing music recordings by the retailers, with payments charged for the service. The practice is so blatant that many retailers advertise the sale of musical downloads (and other copyrighted materials) on banners outside their premises. Moreover, major retail outlets in higher end shopping malls have also been canvassed and investigators have found that staff are prepared to take customers from salesrooms to nearby retail outlets who would then load the devices after completion of the sale. This phenomenon is growing at an exceptional rate and threatens to become the number one piracy problem in the Philippines. Books and journals, especially medical and nursing titles, and trade books are also being offered for download onto PDAs, either by these same for-profit entities or by vendors on medical campuses. Infringers are especially targeting medical students and practicing physicians who want easy access to reference titles. To IIPA’s knowledge, the government of the Philippines has taken no action against any type of mobile device piracy to date.

Camcorder Piracy: Of greatest concern to the motion picture industry is the alarming growth of illegal camcording, in which 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. This usually occurs very early in a movie’s theatrical release window or may even occur prior to the film’s release (e.g., at a promotional screening). Camcorder pirates 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 well before their international debuts. IIPA has become aware that highly organized groups in the Philippines have become a key source of high profile pirate camcording. Infringing copies of U.S. motion pictures distributed globally have been forensically linked to illegal copies made on camcorders in Philippine cinemas.

Internet Piracy: The Philippines now boasts 14 million Internet users, a 15.4% penetration rate, but still a relatively low number of broadband connections (123,000 broadband subscribers as of September 30, 2007).¹² Still, the Business Software Alliance (BSA) noted a sharp increase in monthly

¹¹ Statement by NBDB Chairman Dennis T. Gonzalez, printed in the *Manila Bulletin*, January 15, 2006.

¹² See Internet World Stats, at <http://www.internetworldstats.com/stats3.htm>. These statistics are up-to-date as of November 30, 2007, are based on Census Bureau data, while usage numbers come from various sources, mainly from data published by Nielsen/NetRatings, ITU, and other trustworthy sources. See also Internet World Stats, the Philippines, at

illegal Internet downloads, up from 271 per month in 2006 to 1,302 per month in 2007, representing an almost five-fold increase. Motion picture industry representatives have also noticed an increase in hard goods optical disc websites hosted in the Philippines and supplying overseas consumers.

Retail Piracy of Optical Media: While there remains some optical disc production, which is discussed below, the Philippines is now a net importer of pirated discs, primarily from China, Hong Kong, Taiwan, Indonesia, and Malaysia.¹³ Imported pirated discs also flow into the Philippines via Zamboanga and Davao – both in Mindanao, with Malaysia and Indonesia believed to source these discs. One major criminal case in 2006 was concluded against Indonesian nationals smuggling pirate discs from Indonesia.¹⁴ Market intelligence also suggests an increase of locally burned pirated discs. Quiapo Bartertrade complex, a commercial area in metro Manila that was once dominated by Chinese traders, is now primarily dominated by local traders and is suspected as the center of illegal burning operations. Quiapo also apparently hosts release groups putting out the latest run motion pictures on pirate DVDs (some suspected to be sourced from pirate camcords occurring within the Philippines). It should also be mentioned that Quiapo is a center of other organized criminal activity and is well known as a key local market for illegal drug manufacture and distribution.¹⁵ Because law enforcement in Quiapo is difficult (e.g., it is an incredibly hard place to recruit informers), commercial pirates carry out their activities in Quiapo with impunity.

Signal Theft (Cable and Satellite): Signal theft is a growing problem in the Philippines, resulting in a decrease in revenue for rights holders in broadcast programming. The Cable and Satellite Broadcasting Association of Asia (CASBAA) estimates revenue losses of US\$85 million in 2007, up from US\$80 million in losses in 2006. This translates to 925,000 legitimate Pay TV connections and 950,000 illegitimate connections, a 7% increase in pirate connections year-on-year. The major concern remain small rogue cable television operators, especially in the outer provinces, which use pirated programming. The Philippine government has failed to enforce rights in legitimate programming effectively. Specifically, the National Telecommunications Commission (NTC) has failed to invoke its authority to revoke the licenses of the operators that utilize pirated programming. To the contrary, NTC continues to renew the licenses of rogue operators. Digitization of signals, which will help consolidate the industry and reign in pirate cable operators, has slowly begun in Metro Manila, but has yet to be commenced in other areas of the Philippines.

A Memorandum of 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. According to the IP Philippines page http://www.ipophil.gov.ph/pdf_format/GRPCComment2007.pdf *Strengthening the IP System: The*

<http://www.internetworldstats.com/asia.htm#ph> (reporting that there were 14,000,000 Internet users as of April 2007, representing a 15.4% penetration rate, according to Yahoo; and 123,000 broadband subscribers as of September 30, 2007, according to International Telecommunications Union).

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 or gouged.

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. 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 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).

¹⁵ Other areas of the Philippines also contain pockets of organized and violent criminal behavior according to recent evidence. In a raid on July 27, 2006 on a residential proper in the Taguig suburb of southern Metro Manila, authorities found 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.

Campaign Against Piracy and Counterfeiting in the Philippines (2005-2006), in March 2007, the NTC and IP Philippines were scheduled to sign an agreement on the implementing rules and regulations (IRR) to expedite cases involving cable piracy. However, to date there are apparently no implementing regulations on the MOA.¹⁶ Specifically, under the Agreement, 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.

End-User Piracy of Business Software: 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.

Optical Disc Factory Production: IIPA believes there are still at least 10 optical disc plants in operation in the Philippines, and that one additional plant is defunct following an industrial fire,¹⁷ and two additional plants were closed following a raid.¹⁸ Industry has obtained a list of registered optical disc plants, from which the Optical Media Board claims its number of 10 plants. Most of the plants have been visited by industry and the OMB and full inspections conducted, although it remains unclear whether the OMB, still under the leadership of Edu Manzano, has collected exemplar (sample) discs from all the plants. It should do so forthwith to assist with forensic investigations into piracy. The international recording industry group, IFPI, had previously been involved in plant inspections during 2003-2005 but was not formally notified of any plant visits conducted during 2007. Since legitimate sales of music were roughly 4.5 million discs in 2007, which is less than a single optical disc line can produce in one year, the Philippines clearly still has over-capacity (we estimated the annual capacity at 157.5 million discs in 2006).

ENFORCEMENT UPDATES IN THE PHILIPPINES

IIPA was interested to see President Gloria Macapagal Arroyo's letter memorandum on November 16, 2006 to IP enforcement agencies in the Philippines entitled "Sustaining Our Gains In Protecting Intellectual Property Rights." In the memorandum, the President said that there is still a pressing need to sustain gains from enforcement in 2005-06, and issued the following directives:

- "Intensify public information and education campaign on the importance of IPR in promoting creativity, innovation and competitiveness, and educate our people, particularly the youth, on this matter, through our education system, in order to develop an IP conscious culture"
- "Intensify regular and effective (a) raids and "spot" inspections on factories that produce illegal optical discs, trademarked and copyrighted goods, (b) seizure and destruction of pirated and

¹⁶ 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 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.

¹⁷ Discmakers, located in Punturin, Valenzuela, was destroyed by fire, and contained two optical disc production lines.

¹⁸ Industry reports that MHN Optical Media Corporation, a two-line DVD plant, was temporarily closed after a raid action in 2005 (but was re-visited on several occasions during OMB probably sometime in 2007) and Bright Future Technology, which had eight CD/DVD lines, was raided twice, and had warrants quashed on both occasions. Bright Future has no license issued by the Optical Media Board but the machinery is still in circulation.

counterfeited goods and equipment used to produce them, and (c) arrests and prosecutions leading to deterrent level sentences served”

- “Consider, and as appropriate, enforce criminal, civil or administrative liability of owners of buildings, such as malls and the like, that lease space to establishments selling pirated and counterfeited goods, or ensure implementation of contracts of lease that prohibit tenants from selling pirated goods in the premises of the lessor”
- “Allocate sufficient resources for the conduct of raids and inspections leading to effective prosecution of pirates and counterfeiters of trademarked goods, especially of products affecting public health and safety, such as medicines, cosmetics, food products and auto parts at the retail, distribution, production and importation points”
- “Consider, and as appropriate, implement measures that include suspension, revocation or denial of pertinent national and local government permits or licenses of individuals, firms or establishments that engage in, allow or tolerate the production, importation or sale of pirated and counterfeited goods”
- “Vigorously enforce copyright protection of printed materials. However, formulate and implement effective strategies that would provide affordable access to copyrighted works, especially textbooks, such as copyright licensing and establishment of copyright collection societies or organizations”
- “Maintain appropriate coordination with the Judiciary in ensuring that courts are adequately skilled in intellectual property cases, and in consultation with the Judiciary and Congress, explore the designation or creation of Special Intellectual Property and International Trade Courts”
- “Continue to provide the Executive and the Legislative with policy and legislative proposals in order to update the country’s intellectual property laws, ensuring that these are in compliance with the country’s existing international obligations embodied in treaties and other agreements”
- “The DTI, through IPO, shall continue to coordinate inter-agency efforts against piracy and counterfeiting, maintain a database and enforcement monitoring system, consolidate information and reports from other agencies, and submit quarterly progress reports to the President, and provide copies to the Executive Secretary and the Cabinet Secretary”

IIPA agrees, at least in principle if not specifics, with most of these directives. Implementing the President’s directives is obviously the key, and very much remains a work in progress with some steps forward and others backward. To make further progress, the various enforcement organs in the Philippines must better work together to tackle the myriad piracy concerns and issues. It has proven in practice to be difficult for right holders to navigate the enforcement system in the Philippines, however, given the manner in which the authorities divide responsibilities, sometimes making it difficult to determine who is responsible for what. Enforcement issues are further complicated by external pressures and forces affecting or negating the good intentions of the Philippine government officials with whom IIPA members interact.

The Intellectual Property Office of the Philippines (IP Philippines) stands as both the head of the industrial property operations in the Philippines, as well as the policy-making body for all intellectual property matters, including copyright policy. IP Philippines does not engage in enforcement, but as the chief concerns in recent years have been enforcement-related or piracy-related, IP Philippines has had to infuse itself into the process, which it has principally done in an informational and reporting role. On-the-ground enforcement efforts are left to several agencies, and in some cases, an amalgam of agencies:

- Optical Media Board (OMB) – Deals principally (but not exclusively) with optical disc pirate production and distribution of pirated products in the market

- Anti-Fraud and Commercial Crimes Division/Criminal Investigation and Detection Group of the Philippine National Police (AFCCD/CIDG-PNP) – Has engaged in enforcement activity against book piracy, among other things.¹⁹ This unit has seen a recent changeover of personnel, and IIPA will be monitoring closely its continued effectiveness.²⁰
- Intellectual Property Rights Division-National Bureau of Investigation (IPRD-NBI) – The Philippines' national investigative agency, under the Department of Justice, which has been helpful in investigating copyright infringements and crimes, and has taken on various enforcement functions.²¹
- Intellectual Property Unit-Bureau of Customs (IPU-BOC) – Has engaged in enforcement of border measures, including seizures of suspected shipments of pirated materials.²²

In addition, in August 2005, three enforcement agencies – the National Bureau of Investigation (NBI), the Optical Media Board (OMB), and the Philippine National Police (PNP), signed a Memorandum of Understanding forming Pilipinas Anti-Piracy Team (PAPT),²³ a government-led initiative that became the embodiment of the Philippine government's efforts to eliminate software piracy and promote faster growth of the country's information technology (IT) industry. The Business Software Alliance (BSA) has generally been happy with PAPT's responsiveness to the problem of end-user piracy of business software. In 2007 the PAPT, acting on information supplied by BSA, conducted a record nine end-user software piracy raids successfully. They also held a number of press conferences to drive home the message of protection of software IPR. In addition, they also have a web site through which useful information with respect to IPR can be found and also reports of infringement can be made. As a result, BSA received a number of leads through the PAPT web site.

Overall Results: In its March 2007 report, *Strengthening the IP System: The Campaign Against Piracy and Counterfeiting in the Philippines (2005-2006)*,²⁴ IP Philippines described in detail the various activities in 2006 of each of the enforcement agencies listed above.²⁵ The seizures are impressive,

¹⁹ According to the IP Philippines March 2007 report, see *supra* note 1, among the priority areas of the AFCCD in its campaign against IPR violations is book piracy. The IP Philippines report noted two key raids by AFCCD/CIDG-PNP: 1) June 19, 2006 raid on the premises of Rose Arts Printers in Sampaloc, Manila, serving two (2) search warrants and seizing thirty-five (35) pirate books, one (1) unit Risograph and one (1) unit cutting machine, with an estimated value of P265,978 (US\$6,500); and 2) December 6, 2006 operation against Stall 36 located at U.P. Shopping Center, U.P. Campus, Diliman, Quezon City, resulting in the confiscation of assorted books, photocopy machines, and ring binders with an estimated value of P500,000 (US\$12,300), and resulting in the arrest of the occupant of the stall, Ms. Trinili Faeldan Gabayno; a copyright infringement case was filed against her with the Office of the City Prosecutor of Quezon City. Both cases, a full 15-20 months later, languish as they are pending under the public prosecution system.

²⁰ Lt. Col. Noel de los Reyes, former head of the Crimes Investigation Division (CID) of the Philippine National Police (PNP), very helpfully and effectively pursued copyright cases, notwithstanding the PNP's authority was limited to complaint-driven actions. We can only hope that Colonel Rene Ong who has taken over for Lt. Col. Reyes will be as strong an advocate.

²¹ See http://www.nbi.doi.gov.ph/about_us.html. According to the IP Philippines March 2007 report, see *supra* note 1, from January to December 2006, the IPRD-NBI "received 128 complaints and filed 549 cases directly with the Department of Justice. It has served 419 search warrants and seized a total of 546,464 pieces and 350 boxes/sacks of counterfeited/pirated goods with an estimated value of P290,964,640.00 [US\$7,200,000]." However, it is to be noted that most of the product seized is counterfeit goods, not pirate copyright materials.

²² See *supra* note 1. There are two initiatives which the Bureau of Customs has taken according to the IP Philippines report. One is the establishment of a "Permanent Bureau of Customs Intellectual Property Office (BOC-IPO)" in connection with the Presidential directive (Executive Order No. 366) for Philippine Government agencies to rationalize their operations. The division will have at least twenty-five (25) personnel engage in border protection of IPR. The second is using and revitalizing the 32 year old "Memorandum of Agreement (MOA) with the Postal Service [Philippine Postal Corporation (PhilPost)]," through which, according to IP Philippines, there have been a number of recent seizures of optical media and other prohibited cargo. These are both positive developments in IIPA's view.

²³ See <http://www.papt.org.ph/>.

²⁴ See *supra* note 1.

²⁵ For example, the IP Philippines report indicated,

"The combined enforcement efforts of the Intellectual Property Unit-Bureau of Customs (IPU-BOC), Optical Media Board (OMB), Anti-Fraud and Commercial Crimes Division/Criminal Investigation and Detection Group-Philippine National Police (AFCCD/CIDG-PNP) and Intellectual Property Rights Division-National Bureau of

although it must be noted that most of the product seized was counterfeit goods, not pirate copyright materials. One exception to this was a Bureau of Customs/Optical Media Board joint operation, netting about US\$2 million worth of DVD replicating equipment, capable of making 400,000 pirated copies a day, on January 25, 2007, for mis-declaration and for violating provisions of Republic Act No. 9239 (Optical Media Act of 2003).²⁶ The results on the copyright side are supported by anecdotal reporting from the industry, including a good amount of industry self-help, and including some ingenious methods of detecting piracy, such as the use of industry-trained DVD sniffing dogs.²⁷

The report also noted some key criminal convictions in copyright cases, from 2006 and before. In all, since 2002, there have been a total of eight (8) criminal convictions in the copyright area, with one of those being the Multilinks/Catherine Marquez case that has unfortunately not led to a successful result (since the convicted person has absconded and the piratical activity, according to sources, continues) (see chart below).

Unfortunately, not much is included in any of the government's reports about enforcement against increasingly damaging forms of piracy that are also relatively new in the market, such as mobile device piracy or Internet piracy. In addition, not much has been said by the government about strengthening the law to impose liability on mall owners for infringing activities occurring in their spaces (although there is a House bill that would accomplish this). While the IP Philippines report touted raids taken on notorious pirate mall hotspots such as Metrowalk, Quiapo, Binondo, 168 Mall, Makati Cinema Square, and Greenhills, the government must be adaptive to the needs of industry in a changing piracy landscape, and establishing landlord liability is one area identified by industry that will have the greatest effect on piratical activities in these piracy hotspots.

Additionally, where international links to piracy are found, such evidence should be further investigated. For example, after a large raid in Manila carried out in September 2007, the local record industry group obtained access to the seized optical discs, and found SID Code on many pirate discs allocated to factories outside the Philippines, specifically, Hong Kong, China and Taiwan. The Optical Media Board should routinely review such seizures for forensic intelligence, and conduct follow-up actions. The import of infringing discs should be worthy of proper investigation, interception, and where appropriate, cooperation with foreign authorities to address these international piracy issues.

Criminal Cases in the Philippines Target Mostly Small-time Retail Pirates, and Take Too Long: While it is promising that five (5) of the criminal cases concluding in 2006 or early 2007 were copyright related, it remains to be seen whether the Philippine authorities will target major pirates. For example, in *People vs. Asmawe Tantowa, Abdulah Mama, Maraue Orot, Pandaw Orot, Oding Baro*,²⁸ the defendants were arrested in simultaneous raids conducted by the Silay police (deputized by the OMB to help fight against pirated optical media products) in Silay City on December 10, 2006, and were found in possession of 1,000 pirated optical discs. The Judge of the Silay Municipal Trial Court in Cities (MTCC)

Investigation (IPRD-NBI) in January to December 2006 resulted to the confiscation of 2,990,301 pieces and 7,559 boxes/sacks of fake goods with an estimated value of P1,353,225,596.96 [more than US\$33 million]."

IP Philippines, gathering reports from enforcement groups in the Philippines including the Bureau of Customs (BoC), the National Bureau of Investigation (NBI), the Optical Media Board (OMB), and the Philippine National Police (PNP), reported that as the end of November 2007, seized goods for the year contributed P2.75 billion (approximately US\$67.8 million). See At the End of November 2007, *Seized Goods for the Year Contributed P2.75 billion...*, PNA (Philippines News Agency), December 15, 2007 [on file with IIPA].

²⁶ The smuggled goods, consisting of four "top-of-the-line" machines, video packaging materials and gadgets used in producing pirated copies, were in two (2) 40-footer and two (2) 20-footer container vans from Hong Kong, United States and Taiwan.

²⁷ On April 16, 2007 in a visit to Manila from their current base of operations in Kuala Lumpur, Malaysia, Lucky and Flo, the Motion Picture Association's DVD-sniffing black Labrador retrievers, helped Philippines law enforcement officials seize an estimated 300,000 pirate DVDs from three malls in Manila, Makati Cinema Square, St Francis Square and Metrowalk Mall, notorious for the sale of pirated movies and music. Among the seizures, which had an estimated street value of US\$500,000, were a significant number of discs containing child pornography. See Motion Picture Association, *In Flying Visit to Manila, Lucky And Flo Lead Anti-Piracy Officers to 300,000 Pirated DVDs*, April 17, 2007.

²⁸ *People v. Asmawe Tantowa, Abdulah Mama, Maraue Orot, Pandaw Orot, Oding Baro*, Criminal Case No. 28267-C (for violation of RA No. 9239, the Optical Media Act of 2003).

sentenced five (5) of the sellers of these pirated DVDs and VCDs to three (3) years imprisonment, and ordered them to pay a fine of P500,000 (US\$12,300) each for violation of the Optical Media Act of 2003. In *People v. Macacuna Gandarosa Y Basheron and Alinor Pangcatan Y Abobakar*,²⁹ another retail case, the accused was sentenced to imprisonment for ninety (90) days plus costs.

The effect of the near-total failure of the judicial system cannot be overstated. Cases sent into the public prosecution system languish for years, with little hope of any resolution or even progress. Prosecutors do not move cases through the system, and are indeed careless in their approaches to cases. Summonses are routinely lost in the mail, hindering any assistance that private lawyers could otherwise provide, and cases routinely fall prey to endless delay tactics by defendants.

Wrong Targets, Wrong Timing: That no pirate manufacturer of optical discs has ever been convicted is telling. It is also worth reiterating that criminal cases in the Philippines take too long to resolve.³⁰ This problem was to have been addressed in part by the reorganization of the 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.³¹ It is also telling that nearly 1,000 of these cases remain “pending.” IIPA can only hope the reconstitution of the DOJ Task Force will lead to a dramatic change in results in 2007.

CRIMINAL COPYRIGHT CASES RESULTING IN CONVICTION 2002-2007 PHILIPPINES			
PRESIDING JUDGE	CASE NO.	TITLE	DATE OF DECISION/LAW
Hon. Judge Antonio Jayobo MTCC Silay, Negros Occidental	28277-C	PP v. Abdul Alonto et al.	09 January 2007 (RA 9239: Optical Media Act of 2003)
Hon. Antonio M. Eugenio, Jr. RTC, Branch 24, Manila	00-187015	PP v. Manny Marasigan	05 June 2006 (Copyright infringement)
Hon. Antonio M. Eugenio, Jr. RTC, Branch 24, Manila	98-169591 99-171135	PP v. Nestor C. Yao ³² PP v. Nestor C. Yao alias “Jao Jee Hung”	13 July 2006 (Copyright infringement)
Hon. Rufino S. Ferraris, Jr. MTCC, Branch 7, Davao City	119, 756-G-04 119, 757-G-04	PP v. Macacuna Gandarosa Y Basheron & Alinor Pangcatan Y Abobakar	13 November 2006 (RA 9239: Optical Media Act of 2003)
Hon. Judge Antonio Jayobo MTCC Silay, Negros Occidental	28267-C	PP v. Asmawe Tantowa, Abdulah Mama, Maraue Orot, Pandaw Orot, Oding Baro	20 December 2006 (RA 9239: Optical Media Act of 2003)
Hon. Raul E. De Leon RTC, Branch 258, Parañaque City	03-0320 03-0321, and 03-0322	PP v. Eugene Li	10 February 2005 (Copyright and Trademark infringement and Unfair competition)
Hon. Edwin D. Sorongon RTC, Branch 214, Mandaluyong City	MC-00-3006 to MC-00-3015	PP v. Catherine Marquez	22 June 2004 (Copyright infringement)
Hon. Antonio M. Eugenio RTC, Branch 24, Manila	99-172794	PP v. Harold Chua ³³	03 October 2002 (Copyright Infringement)

Telmarc Cable Case Casts Doubt on The Philippines’ Compliance with International Norms: On May 31, 2007, in the case *Telmarc Cable v. Hon. Antonio M. Eugenio, Jr.*,³⁴ the Honorable Mariano C. Del Castillo of the Manila Court of Appeals, Sixteenth Branch, reversed the Honorable

²⁹ *People v. Macacuna Gandarosa Y Basheron and Alinor Pangcatan Y Abobakar*, Criminal Case No. 119, 756-G-04 and 757-G-04 (for violation of RA No. 9239, the Optical Media Act of 2003).

³⁰ The case against Beltron, which was raided in 1995, is instructive. 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, industry has yet to receive any notice from the court regarding the arraignment of the accused. In effect, they are into the 13th year since the case began.

³¹ This was accomplished as per Department Order No. 657 s 2005.

³² Defendant Yao was 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 P200,000 (approximately US\$5,000).

³³ Defendant Chua was owner of Triac Marketing which was raided in 1998. Mr. Chua was sentenced to one year imprisonment and a fine of P50,000 (US\$1,200) in 2002.

³⁴ *Telmarc Cable v. Hon. Antonio M. Eugenio, Jr.*, CA-G.R. SP. No. 96767, May 31, 2007

Antonio M. Eugenio, Jr.'s³⁵ May 29, 2006 denial of a motion to quash 40 search warrants related to Telmarc's alleged signal theft ("illegal and unauthorized decoding, rebroadcast, distribution and/or performance of copyrighted programs in violation of Section 177 in relation to Section 217 of the Intellectual Property Code, R. 8293"). In language eerily similar to that of the court in the *Solid Laguna* case,³⁶ which we have discussed extensively in previous filings, and which the Philippine government has said is not the law given the *en banc* Supreme Court ruling in the *Columbia* case,³⁷ Judge Del Castillo wrote in *Telmarc Cable*,

It has been held that "the true test of sufficiency of a deposition or affidavit to warrant issuance of a search warrant is whether it has been drawn in a manner that perjury could be charged thereon and the affiant could be held liable for the damage caused. The oath required must refer to the truth of the facts within **the personal knowledge** of the applicant for search warrant and/or his witnesses, not of the facts merely reported by a person whom one considers to be reliable."³⁸

In the *Solid Laguna* decision, the Court stated,

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

and

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

The *Telmarc Cable* ruling, as the *Solid Laguna* ruling had done, creates an unworkably high evidentiary burden for rights 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 *en banc* 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 Philippine government has previously (subsequent to *Solid Laguna* but prior to *Telmarc Cable*) claimed that the ruling of the Supreme Court's Third Division in *Solid Laguna* 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.

The rule set out in *Solid Laguna* and *Telmarc Cable* is at odds with, departs from, and clearly does not follow the rule in the *Columbia* case. *Solid Laguna* and *Telmarc Cable* set the proof standard impossibly high for obtaining a search warrant, and probably implicate the Philippines' TRIPS obligations.³⁹ The evidentiary standard falls well outside the mainstream of other countries with respect to

³⁵ Presiding Judge of the Regional Trial Court, Branch 24, Manila.

³⁶ *Sony Music Entertainment (Phils), et al v. Hon. Judge Dolores Español et al* (G.R. No 156804, March 14, 2005).

³⁷ See *Columbia Pictures Entertainment, Inc. v. Honorable Court of Appeals, 14th Division and Jose B. Jingco of Showtime Enterprises., Inc.*, G.R. No. 111267, September 20, 1996 (J. Romero, Second Division).

³⁸ *Telmarc Cable* at 8.

³⁹ TRIPS Article 41.2 provides, "Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays."

grants of search warrants and seriously jeopardizes the expeditious availability of warrants. The application of *Solid Laguna* or *Telmarc Cable* 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.⁴⁰

We understand that the cable channels and rights holders in broadcast programming have appealed the decision in the *Telmarc Cable* case. We hope that the case will be reconsidered in light of the standing precedent in *Columbia*; if necessary, the Philippine Congress should pass legislation codifying *Columbia* and overruling *Solid Laguna* and *Telmarc Cable* to ensure that the rule for obtaining a warrant is clear and TRIPS-compatible.

Juliano-Tamano Case: On July 5, 2007, in the case *Juliano-Tamano et al v. Discovery Communications, Europe et al*,⁴¹ the Secretary of the Department of Justice of the Philippines reversed a resolution finding probable cause to indict the Respondents (Juliano-Tamano et al) for violation of the IP Code. In what should have been essentially an open-and-shut cable piracy case involving unauthorized broadcasts of motion pictures and television shows, the Secretary concluded that “It is ... evident that ‘broadcasting’ is not included, intentionally or unintentionally, among the copyright or economic rights protected by RA 8293.” This is clearly incorrect. Broadcasting organizations hold various rights under Section 211 of the Philippines Copyright Act, and the complainants, also being copyright holders in the programming having been disseminated without authorization, hold exclusive rights under Section 177. We understand that the Attorney General’s office has undertaken a review of the reversal, so the case will not be summarily dismissed by the Cotabato City Court. IIPA also understands the AG’s office may be overturning the reversal, which would be the right step.

Marquez Case: IIPA has long documented the problems experience in the *Multilinks Book Supply* case, involving the Marquez defendants. Mrs. Catherine Marquez was convicted on June 22, 2004, and sentenced to one year in jail and to fines of P50,000 (US\$1,200) per count for copyright piracy, and all appeals were exhausted. To this day, she remains free, and there is evidence that she remains involved, if indirectly, in illegal business activities, as it appears several government-run universities, hospitals and agencies are still ordering illegal photocopied books from her business (now fronted by her husband, against whom several cases are also pending). The Marquez family was raided once again on August 3, 2005, and two additional prosecutions were initiated, both moving slowly through the private prosecution system. It is difficult to imagine a clearer example of lack of deterrence than what has occurred in these cases. Mrs. Marquez is now a fugitive from justice and was placed on the “most wanted” list several months ago. It would be an important accomplishment to find her.

Irregularities Continue to Plague the Enforcement System: It is no secret that piracy is funded by wealthy and well connected Filipinos. In general, stall-holders are well organized and are believed to have connections with enforcement authorities. IIPA members report that pirate operators have also established an organized short message service (SMS – text messaging) warning system of impending raids. Such a system would be indicative of an overall lack of information integrity.

Still No Ex Officio Authority for Police: 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 rights holder complaint. This should be remedied, and the authority should of course extend to initiating actions and seizing infringing items *ex officio*.

⁴⁰ 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.

⁴¹ *Juliano-Tamano et al v. Discovery Communications, Europe et al*, I.S. No. 2006-002, Secy. of Dept. of Justice Chambers, July 5, 2007 (Cotabato City Court).

TRAINING AND PUBLIC AWARENESS

IIPA members continued to provide and participate in various public awareness and training activities in the Philippines in 2007. It is also noteworthy that on January 27, 2007, the government of the Philippines and the U.S. signed a Memorandum of Agreement on Intellectual Property Rights, in part to further strengthen IPR protection in both countries. The following is a non-exhaustive list of industry trainings:

- The Motion Picture Association's local representative participated in a training event in 2007 focusing on exposing participants to the new methods/trends/technology used by pirates to record the latest movies in cinemas using camcorders. Participants were briefed on steps to take when they detect camcording piracy.
- The Business Software Alliance's (BSA) local representative provided five agents of the Criminal Investigation Division of the Philippine National Police with training on January 31, 2007, including computer systems checks and identification of product keys of software installed in computers.
- The BSA's local representative provided a PAPT technical training in June 2007 to 34 agents from the NBI, OMB and PNP. The technical training included a lecture on kinds of software piracy, and software system checks. The agents were trained on how to identify unauthorized software installed in computers and how to capture product keys. There was also a presentation on licensing guidelines.
- The BSA local representative provided a PAPT technical training on September 27, 2007 to agents from the NBI, OMB and PNP.

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.⁴² 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 2006.⁴³

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 ISSUES

Copyright protection is governed under Republic Act 8293, the Intellectual Property Code (IPC) of the Philippines (in force January 1, 1998).

⁴² Other important provisions in the draft cable law include some loosening of advertising restrictions and stiffer penalties for cable piracy.

⁴³ IIPA also understands that the bill contains foreign investment restrictions for some copyright industry sectors.

WIPO Treaties Implementation and Other Needed Amendments: The Philippine government has, since it joined the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, placed on the Congressional agenda passage of amendments that would fully implement those treaties as well as make other necessary changes to accommodate changing substantive and enforcement concerns (such as the addition of statutory damages and a codification into Philippine law of secondary liability). The latest attempt is contained in Senate Bill 880 (sponsored by Senator Edgardo J. Angara), which is virtually identical to bills proposed in previous Philippine Congresses. Representative Jose Solis has also introduced House Bill No. 1033, which would specifically introduce landlord liability for mall owners harboring pirates in their malls. IIPA strongly supports passage of SB 880, with a couple of modifications,⁴⁴ and House Bill No. 1033.

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 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.”

In short, 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 “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 a speech in 2006 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.”

⁴⁴ The proposed modifications to SB 880 are:

- First, IIPA proposes a systematic approach to exceptions and limitations in the IP Code, 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). Such modifications would offer a fuller guarantee for compliance with international norms.
- Second, there is one provision in need of clarification regarding 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... .”

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.⁴⁵ 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\$32 million (Php1.3 billion) in tax revenues and US\$623 million (Php 25.3 billion) to the economy, create 2,200 new IT jobs and increase local vendor revenues by US\$431 million (Php 17.5 billion).⁴⁶ Other creators in the Philippines, e.g., film makers like Gerardo De Leon,⁴⁷ Ishmael Bernal,⁴⁸ Eddie Romero,⁴⁹ 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*,⁵⁰ writers like Nick Joaquin,⁵¹ Edith Tiempo,⁵² and Virgilio Almario;⁵³ musicians like Antonio Molina,⁵⁴ Jose Maceda,⁵⁵ and Ernani Cuenco,⁵⁶ as well as those involved in entertainment software development,⁵⁷ all stand to reap the benefits of better copyright protection in the Philippines.

Anti-Camcording Legislation: IIPA also calls upon the government to enact legislation to prevent the unauthorized operation of audiovisual recording equipment in motion picture theaters while a motion picture is being exhibited. While the illegal copying is already a violation of the copyright law, the added protection against unauthorized use of the equipment in the theater will obviate the need to prove infringement in order to combat this highly damaging activity.

Government Legalization: Regarding government acquisition of legitimate software, Executive Order No. 262, 2000 entitled "Providing Policies, Guidelines, Rules and Regulations for the Procurement

⁴⁵ 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.

⁴⁶ 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>.

⁴⁷ 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 is "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.

⁴⁸ 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.

⁴⁹ 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").

⁵⁰ The Philippines has a rich tradition of motion picture production, including the films of the late Lino Brocka.

⁵¹ 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.

⁵² 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.

⁵³ 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.

⁵⁴ 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*, *Pandangguhan*; and (vocal music) *Amihan*, *Awit ni Maria Clara*, *Larawan Nitong Pilipinas*. See http://www.ncca.gov.ph/about_cultarts/cultprofile/natarts/music/molina.php.

⁵⁵ 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.

⁵⁶ 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

⁵⁷ 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).

of Goods/Supplies by the National Government” was promulgated. The E.O. prohibits government from purchasing illegal software and allows only suppliers of legitimate software to participate in government bidding. Then, in 2002, Republic Act No. 9184 otherwise known as the “Government Procurement Reform Act” was enacted. Under this law, the Bids and Awards Committee determines the eligibility of prospective bidders for the procurement of goods, with bidders attesting under oath that they are providing/using legitimate software.

Licensing Book Copying: The Philippine government continues to ponder a licensing scheme under a reprographic rights organization (RRO), and indeed, provision for collective management is built into the government’s plan.⁵⁸ There are two RROs in the Philippines, the Philippines Reproduction Rights Organization (PRRO) and the Filipinas Copyright Licensing Society (FILCOLS). Industry notes that in considering reprographic licensing for the Philippines, it is crucial to ensure that:

- Any scheme is voluntary.
- Government oversight and regulations do not rise to the level of interference with market forces.
- Licensing fees are appropriate and fair. Some have suggested PP100 (US\$2.50) per student per semester, which is entirely too low and a non-starter from the publishers' point of view.
- Appropriate parameters are placed on the copying allowed by any license. The publishing industry has heard of proposals along the lines of 10% of a work, one chapter of a book, or one journal article, whichever is greater. However, there are problems with such an approach, since the numerical threshold may lead to abuses (e.g., several students banding together to copy an entire book, or copying a book at a series of shops or over the course of a few days).
- The scheme targets appropriate licensees, i.e., copy shops should not be a primary target.

IIPA notes that any volunteer licensing 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. In addition, IIPA expects full consultation with the affected industry groups before the Philippines rushes headlong into endorsing an official RRO.

Fair Use Guidelines: IIPA has learned that the National Book Development Board is considering fair use guidelines for classroom use along the lines of those that are in place in the United States. NBDB is apparently still working on a draft, but IP Philippines has provided comments. The timetable being discussed is February 15, which is quite unrealistic if proper dialogue among affected groups is to occur. Industry must be involved in the process, with proper consultation and transparency.

Other Legislation: As is usually the case in the Philippines, there are several copyright-related bills being considered by the current Congress. IIPA has not fully analyzed each of these, but states in general its support for Senate Bill 1572, An Act Strengthening the Enforcement of the Copyright Protection of Intellectual Property Right Owners of Computer Programs Creating For This Purpose the Business Software Copyright Piracy Enforcement Unit, Defining Its Powers and Functions, Appropriating Funds Therefor, and For Other Purposes. IIPA also supports the principles behind Senate Bill 684, An Act Requiring the Teaching of Intellectual Property Ownership Particularly Copyright Law as Part of the Curriculum of All Primary, Secondary and Tertiary Schools In the Country, and For Other Purposes.

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

⁵⁸ The Strategic Plan (2007-2009) contains the directive for IP Philippines to “[a]ssist in formulating an accreditation system for collection societies,” to “[h]elp establish collection societies to help the creative industries manage arrangements for licensing, marketing, and distribution of their works, collection of royalties, and enforcement of their rights,” and one of the key performance indicators in that report is that “[a]t least 4 collecting societies are established.”

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.” During the first 11 months of 2007, \$1.1 billion worth of Philippine goods, or 12.7% of the Philippines’ total exports to the U.S. from January to November 2007, entered the U.S. under the duty-free GSP code. 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.⁵⁹

⁵⁹ 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”).