

THE PHILIPPINES

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: The Philippines should be elevated to the Priority Watch List. IIPA also may recommend a review to determine whether the Philippines qualifies for benefits under the Generalized System of Preferences trade program, under which more than \$913 million of Philippine goods, or more than 10.5% of the Philippines' total imports to the U.S. in 2008, enjoyed duty-free access to the U.S. market.

Executive Summary: In general, the piracy situation in the Philippines worsened in 2008. In addition to physical piracy (CDs, DVDs, CD-ROMs, photocopies and book reprints), the legitimate market for foreign and local Philippine copyright material was decimated by Internet piracy (mainly peer-to-peer), mobile device piracy, camcording piracy, retail piracy, optical disc production, and pay TV theft. The Philippine Anti-Piracy Team (PAPT) provided support for anti-piracy activities upon industry request, but too few investigations led to arrests and prosecutions. The promise of establishment of new intellectual property courts has not yet been fulfilled, but hopefully can be accomplished in 2009 to ensure copyright cases do not languish or conclude badly. Judicial corruption has become an increasingly serious concern. Only a handful of criminal convictions in copyright cases have ever been handed down in the Philippines, with even fewer achieving deterrent sentences, or sentences that were carried out in practice.

Priority Actions Requested in 2009: IIPA requests the following actions, which, if taken, would result in the most significant near term commercial benefits to the copyright industries:

Enforcement

- Ensure search warrants are obtainable on a reasonable and timely basis consistent with international law.
- Develop IP expertise in judges and prosecutors by re-establishing intellectual property courts and increasing speeds of dockets, enabling a significant number of pending cases to move forward in the system.
- Launch anti-corruption initiative to eradicate compromises in IP enforcement and take action to punish offenders.
- Remedy bottlenecks on inquests and preliminary investigations by the Department of Justice by streamlining signing procedures (now apparently limited to one or two officials with authority to sign).
- Increase the number of investigations (including *ex officio*), raids and criminal proceedings against: mall owners and retail merchants engaged in piracy, including mobile device piracy; those engaged in illegal camcording of motion pictures; photocopy shops; large-scale pirate distributors; businesses engaged in corporate end-user piracy of software and other materials; and optical disc plant owners (in both unlicensed replicating plants and licensed plants).
- Increase the capacity to investigate and eradicate P2P and other Internet-based piracy; implement current laws (like the E-Commerce law) and pass pending legislation to foster removal of infringing material or services from the Internet through imposing ISP liability and an effective notice and takedown system.
- Address book piracy through closer monitoring of key areas selling pirated books, both on and off university campuses, and employ resources to locate and arrest fugitives in piracy cases.
- Cease licensing new optical disc plants forthwith since the Philippines suffers from production overcapacity and closely monitor the activities of licensed plants which are known not to be used by the legitimate sector, or have previously been caught manufacturing infringing products, through regular inspections by properly-trained personnel.
- Allow right holders to participate in investigations and accompany inspectors.
- Augment anti-camcording enforcement efforts.
- 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.
- Expedite the collection of public performance royalties on the broadcast or communication to the public of sound recordings by removing obstacles to collection and assisting in information dissemination to dispel public confusion.



Legislation

- Pass as a matter of first priority the copyright law amendment Bill (SB 880 and HB 03741) aimed at implementing the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty and making other positive changes.
- Enact national legislation (HB 04117) to halt illegal camcording of motion pictures, and promote and support implementation of the law and city ordinances through training for PAPT.

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Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2004-2008 ¹										
INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level								
Business Software	105.0	70%	88.0	69%	71.0	71%	46.0	71%	38.0	71%
Records & Music	117.0	83%	88.3	80%	50.3	62%	21.0	40%	20.0	40%
Books	NA	NA	49.0	NA	49.0	NA	48.0	NA	48.0	NA
Entertainment Software	NA	NA	NA	NA	NA	NA	11.3	85%	NA	90%
Motion Pictures	NA	78%	33.0	85%						
TOTALS	222.0		225.3		170.3		126.3		139.0	

PIRACY CHALLENGES IN THE PHILIPPINES

Camcording Piracy: In 2008, the Philippines held the dubious distinction of being among the world's worst in terms of number of forensic matches and interdictions in illegal camcording of motion pictures. The number of instances of illegal camcording forensically matched to the Philippines in 2008 was 44, a 389% increase over 2007. Philippine movie pirates choose films that release earlier than, or day-and-date with, the United States, and notably, a day-and-date release in the Philippines is still more than half a day earlier than a U.S. release. For example, *Rambo* and *Indiana Jones and the Kingdom of the Crystal Skull* were illegally camcordered in the Philippines and uploaded to the Internet the same day as their U.S. theatrical release. The movie *Jumper* was illegally camcordered in the Philippines and available on the Internet four days before its U.S. theatrical release. Infringing copies of U.S. motion pictures forensically linked to illegal copies made by camcorders in Philippine cinemas are distributed globally (13 different countries across 3 continents). The Motion Picture Association notes that approximately 57 percent of illegal camcords forensically traced to theaters in the Philippines have been found outside of the Philippines, either in hard goods or on the Internet. This piracy has a devastating impact on the life cycle of U.S. motion pictures, eroding their viability not just in the Philippines and other Asia Pacific markets, but also in the United States. Camcorder piracy in the Philippines has also had a profound negative effect on the local movie theater business in the Philippines. As a result of illegal camcording, countless thousands of theatrical receipts are being lost, as movie theater tickets range from P120 (US\$2.55) to P150 (US\$3.20) for a high end theater, while a pirate DVD generally runs around P80 (US\$1.70). Pirate versions sourced from illegal camcording are often available just two or three days after the theatrical release in the Philippines.

Internet Piracy: Internet usage in the Philippines exploded in 2008. A recent study by Universal McCann notes 37 million regular Internet users² and Internet World Stats notes almost 1 million broadband connections in the country as of March 2008,³ representing significant growth compared with 2007. The Philippines ranked seventh in the world in percentage growth of broadband connections in the year ending October 1, 2008.⁴ It is therefore not surprising that Internet piracy grew in 2008, predominantly through peer-to-peer (P2P) services and involving all kinds of copyright content (for example, in 2008, illegal downloading of e-books increased, as did the sale online of scanned versions of

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. BSA's 2008 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in the Philippines. They follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at <http://global.bsa.org/idcglobalstudy2007/>. 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. For more details on the Philippines' Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

² Lawrence Casiraya, *RP Has Highest Percentage of Social Network Users – study*, May 8, 2008, available at <http://newsinfo.inquirer.net/breakingnews/infotech/view/20080508-135336/RP-has-highest-percentage-of-social-network-users----study>.

³ See Internet World Stats, at <http://www.internetworldstats.com/stats3.htm> (citing International Telecommunications Union).

⁴ See Fiona Vanier, *World Broadband Statistics Q3 2008*, PointTopic, December 2008, at 17.

textbooks, reference books and trade books placed onto CD-Rs). In addition, the Internet has become the source of choice for other forms of piracy, including mobile device piracy and even DVD and VCD content.

Mobile Device Piracy: Mobile device piracy similarly exploded in the Philippines in 2008. Vendors in the Philippines have dedicated booths and stalls within shopping malls (like notorious shopping areas such as Metrowalk, Makati Cinema Square, and Quiapo) and pre-load, load after the sale, or “download for a fee” pirate content (music, published materials, etc.) onto mobile telephones, MP3 devices, flash drives, recordable optical discs, and even computer hard drives. An investigation in late 2007/early 2008 revealed a chain of computer dealerships actively involved in unauthorized direct loading to iPod music player devices at the point of sale. Test purchases made from every branch of the chain resulted in the staff loading many hundreds of songs on purchased devices. The practice is so open and blatant that many retailers advertise the sale of pirate downloads on banners outside their premises. Moreover, staff in major retail outlets in even high-end shopping malls will take customers from their salesrooms to nearby piracy retail outlets to load the devices after sale. 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 especially target medical students and practicing physicians who want easy access to reference titles.

Business Software End-User Piracy: The rampant use of unlicensed software in the workplace by businesses continued to cause the greatest revenue losses to the software industry in 2008, thereby stunting the growth of the information technology sector. The piracy rate (estimated to be 70% in 2008) remained high compared to the regional median for Asia of 66% in 2008. The continuing high piracy level can be attributed in part to an increase in PC shipments to the Philippines, without a commensurate rise in legitimate software sales.

Book and Journal Piracy: In 2008, illegal commercial-scale photocopying of entire books (and some print piracy) continued to harm foreign and domestic publishers in the Philippines, in commercial establishments surrounding universities, or in street stalls in metropolitan areas. Activity even continued near the Philippine Regulations Commission, the government institution that regulates legitimate business in the country. Photocopy shops operate on college, medical and nursing school campuses. The high number of college and graduate students in the Philippines results in high demand for university textbooks, technical books, and professional medical and nursing books. The “university belt” in Metro Manila is especially well known, and publishers have discovered that most cities contain areas rife with photocopy shops. Photocopy shops also operate in and around hospitals; some even sell pirate versions door-to-door to doctors’ offices and medical establishments, and at trade fairs. These shops avoid holding stockpiles of infringing goods and copy on a “print to order” basis, complicating investigations and enforcement actions. Pirates can also burn CD-Rs with up to 100-200 titles on each disc, or can scan files, making them available for download onto PDAs in hospitals, educational institutions, and even shopping malls. U.S. publishers have encouraged the Commission on Higher Education (CHED) to provide proper incentives to campuses that do not tolerate illegal activity by vendors or students, and consequences (e.g., regarding accreditation and funding) for universities that fail to deter this activity. To date they have not acted on that request.

PD 1203 Reprints: Apart from the photocopying issue, publishers remain concerned about possible 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 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.” Prior to the issuance of this statement, the IPO had asked the distributors of books purporting to be reproduced or left over under Presidential Decree 1203 to remove illegal stocks from their stores, resulting in some improvement, although the suspicion remains that stocks simply moved to a less open location.

OD Replication for Export: The Philippines once again apparently emerged in 2008 as an exporter of pirate CDs, DVDs, and CD-ROMs. Local production reportedly makes up an estimated 40 to 50 percent of hard goods found in the domestic market and pirates once again have found it profitable to export. We believe the Optical Media Board (OMB) holds a list of licensed plants that has not been made available to IIPA and apparently has not been shared with the U.S. government. However, it is clear that the total number of plants in the Philippines have a production capacity which exceeds legitimate demand.

Retail and Mall Piracy: With increased production has come increased detriment to copyright sectors in the Philippines. As an example, hard goods piracy has all but wiped out home video sales with pirates controlling upwards of 90 percent of the P6 billion (US\$127 million) industry. Availability of pirate CDs, DVDs and CD-ROMs (and burned CD-Rs and DVD-Rs) remains stable, although pirate product has been relocated from hot spots like Virra Mall, Greenhills Shopping Center in San Juan, and Circle C Mall in Project 8, Quezon City to neighboring streets outside the mall vicinity. "Runners" inside and out of these malls offer product and lead buyers to the neighboring street. Piracy remains open at other notorious shopping areas such as Metrowalk, Makati Cinema Square, Quiapo, and the Paranaque Night Ruins. As noted, pirates sell both locally-produced discs and imports primarily from China. Market intelligence also suggests an increase of locally burned pirated discs (including a recent proliferation of pirate DVD-Rs) from Quiapo Bartertrade complex, which is also known as a key local market for illegal drug manufacture and distribution. One reason pirate product remains ubiquitous in the Philippines is the increasing availability of inexpensive hardware that plays the various media, as there is anecdotal evidence that pirate CD and DVD sales rose concomitant with the arrival in the Philippines of cheap CD/DVD players.

Mechanical License Piracy (Karaoke): Karaoke is quite popular in the Philippines, and in a recently reported phenomenon, various machine brands are sold in Raon, Quiapo with accompanying discs containing as many as 5,000 karaoke tracks. These tracks consist of both local and international repertoire. Some brands come preloaded with karaoke recordings of legitimate record companies. Roughly four brands have sought licenses from music publishers, but those that don't are violating copyright for failure to pay proper royalties. Exacerbating the problem are a few of the manufacturing companies which have slapped USB ports onto their karaoke machines which allow them or the owners of the machines to add tracks, including from the manufacturer's websites.

Pay TV (Cable and Satellite) Piracy: There remain an estimated 800 pirate (unlicensed) cable systems broadcasting copyright content without consent from the channels or the content owners in the programming of those channels. The Cable and Satellite Broadcasting Association of Asia (CASBAA) estimated revenue losses of US\$85 million in 2007 to the channels and content owners, and continuing losses in 2008.

ENFORCEMENT CHALLENGES IN THE PHILIPPINES

Major issues still plague right holders seeking redress for copyright infringements in the Philippines, most notably (as discussed below), the complete systematic failure of the courts to mete out proper deterrent justice in open-and-shut piracy cases. Overall, the system in the Philippines lacks well-coordinated and sustained enforcement efforts by the various vested authorities and enforcement coordination. Executive Order 736, issued by the President on June 21, 2008, attempted to address this lack of coordination. The EO institutionalizes permanent intellectual property units in the Philippine government's law enforcement agencies, creating the National Committee on Intellectual Property Rights (NCIPR) as the coordinating body of various units. The Department of Trade and Industry chairs the NCIPR and the Intellectual Property Office serves as vice chair, and members include the Department of Justice, the Department of the Interior and Local Government, the Bureau of Customs, the National Telecommunications Commission, the National Bureau of Investigation (NBI), the Philippine National Police (PNP), the Optical Media Board (OMB), the National Book Development Board, the Bureau of Food and Drugs and other agencies. IIPA understands that the NCIPR has met and is encouraged by its creation but has yet to see any progress toward more effectively addressing IPR infringements in the country on a national level. Meanwhile, the Pilipinas Anti-Piracy Team (PAPT), made up of the PNP, NBI and OMB, continued in its initiative begun in 2005 to eliminate software piracy and promote faster growth of the country's IT industry, and the Business Software Alliance remained pleased with its working relationships with PAPT, conducting eighteen end-user raids and two retail raids in 2008. Finally, there were again some impressive seizures of pirate product in 2008, as the motion picture industry's enforcement program specifically reports 1,685 inspection orders, resulting in seizures of 4.1 million pirate discs. Yet, out of all that raiding activity, and raids on behalf of other industries, not one criminal case was concluded.

Criminal Court System Remains Dysfunctional and Non-Deterrent: Starting with the criminal inquest procedure at the Department of Justice, and ending with criminal trial, criminal cases in the Philippines on copyright matters almost never conclude successfully. The inquest procedure can take many months, delayed by bureaucratic hurdles (the need for multiple signatures from too few designated officials), with little assistance by prosecutors (e.g.,

putting together evidence, obtaining witness testimony, and obtaining business records). Cases listed for trial proceed on non-consecutive days with multiple adjournments of several months at a time. For example, a ten-day trial with three month adjournments would typically take at least two and a half years. During the elongated trial period, many problems often arise, including the transfer of prosecutors and judges (meaning institutional memory of the case is lost); delay tactics by defendants' counsel by challenging search warrants or seeking further delays due to technicalities; and even the disappearance of key witnesses, the defendants themselves (the Philippine National Police have shown no sustained inclination or interest in searching for defendants), or key evidence needed to properly adjudicate the case. Challenges by defendants' counsel (even those without merit) usually result in automatic consideration, leading to further months of delay before such technicalities are adjudicated. As a result, the criminal system offers no deterrence to copyright piracy. No criminal copyright convictions were secured prior to 2002, and since 2002, there have only been five convictions under the Copyright Act.⁵ The largest criminal fine in any of the cases thus far was a modest P200,000 (approximately US\$5,000), and while two defendants were sentenced to one year in prison or more, in one case involving blatant and massive photocopy piracy, the defendant remains at large.

Establishment of IP Court Would Succeed If Copyright Cases Proceed to Conclusion with Deterrence:

IIPA hopes the Philippine government will follow through on indications that it would reestablish a specialized IP court in the Philippines, in line with President Gloria Macapagal Arroyo's call for such a court. IIPA would hope that, as a result of the establishment of these new courts, greater numbers of criminal prosecutions against key mall operators, pirate book producers, large-scale pirate distributors, optical disc plant owners, those engaged in illegal camcording and other key pirates would ensue.

Lack of Effective Search Warrant Procedure in Copyright Cases:

One of the most problematic and frustrating aspects of the Philippine court system has been the *de facto* unavailability of search warrants in copyright cases due to constitutional challenges by defendants' counsel. The *Telmarc Cable* case,⁶ coming on the heels of the search warrant quashed in the *Solid Laguna* decision,⁷ was affirmed by the Supreme Court in 2007. In the *Telmarc* case, the Supreme Court indicated that for an affidavit to properly support a search warrant, 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" [emphasis added]. Notwithstanding the fact that the claimants took the police officer to the site of the infringement to personally witness the acts being committed, the warrants were quashed. The most recent example of egregious results occurred in a case against the Powermac Centre Company, concerning the unauthorized pre-loading of mp3 music files on to iPods by Powermac's retail stores. In this case, the judge quashed his own search warrant issued in January 2008, making the seized product no longer admissible in court. These decisions belie the government's indications that the Supreme Court's own decision in the *Columbia* case⁸ (a case which held that affidavit evidence is sufficient to uphold the requirement of "probable cause" to obtain a search warrant) was the controlling precedent. Without the availability of a search warrant remedy - a TRIPS requirement - progress cannot be made in piracy cases in the Philippines. Finally, and sadly, it appears that some corruption pervades the system in the Philippines.

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 right holder

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TITLE	DATE OF DECISION/LAW
PP v. Abdul Alonto et al.	09 January 2007 (RA 9239: Optical Media Act of 2003)
PP v. Manny Marasigan	05 June 2006 (Copyright infringement)
PP v. Nestor C. Yao; PP v. Nestor C. Yao alias "Jao Jee Hung"	13 July 2006 (Copyright infringement)
PP v. Macacuna Gandarosa Y Basheran & Alinor Pangcatan Y Abobakar	13 November 2006 (RA 9239: Optical Media Act of 2003)
PP v. Asmawe Tantowa, Abdulah Mama, Maraque Orot, Pandaw Orot, Oding Baro	20 December 2006 (RA 9239: Optical Media Act of 2003)
PP v. Eugene Li	10 February 2005 (Copyright and Trademark infringement and Unfair competition)
PP v. Catherine Marquez	22 June 2004 (Copyright infringement)
PP v. Harold Chua	03 October 2002 (Copyright Infringement)

⁶ *Telmarc Cable v. Hon. Antonio M. Eugenio, Jr.*, CA-G.R. SP. No. 96767 May 31, 2007. See IIPA's 2008 Special 301 report on the Philippines for further discussion, at <http://www.iipa.com/rbc/2008/2008SPEC301PHILIPPINES.pdf>.

⁷ *Sony Music Entertainment (Phils), et al v. Hon. Judge Dolores Español et al*, G.R. No 156804, March 14, 2005.

⁸ 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).

complaint. This should be remedied, and the authority should extend to initiating actions and seizing infringing items *ex officio*.

Lack of Effective Enforcement Against Illegal Camcording: As noted, the Philippines has become among the world's worst countries in allowing illegal camcording of motion pictures right off the screen. IIPA members have discussed this problem with the IP Office on numerous occasions in 2008, and hope for the Director General's strong support of national legislation and a strict enforcement campaign to defeat this virulent form of piracy in 2009. In the meantime, swift and immediate enforcement action/investigation should commence against illegal camcording. IIPA notes with optimism the introduction of HB 04117, the Anti-Camcording Act of 2008, on May 19, 2008.⁹ The Bill sits with the Committee on Public Information but apparently will be voted upon in early 2009. The Bill should be enacted with the greatest priority. Local ordinances in Metro Manila and Quezon City are welcome, but this problem is of a national scope and requires a national solution (and the Copyright Act, while helpful, is insufficient on its own to eradicate the illegal camcording problem). HB 04117 would define the acts constituting unauthorized possession, use and/or control of audiovisual recording devices, and the presumptions as to the subsistence of copyright and ownership of copyright. There have reportedly been attempts by the OMB to expand its jurisdiction into camcording piracy, although there appears to be opposition to this jurisdictional assignment, including by theatre owners (National Cinema Association of the Philippines or NCAP). The National Bureau of Investigations (NBI) also recently introduced new procedures for anti-camcording complaints which were supposed to make it easier for rights holders to complain about illegal camcording, but reportedly the procedures are quite onerous (and simply lead back to the IP Code, i.e., they do not impose new liability or ease evidentiary burdens). While IIPA is appreciative of efforts by NBI to create this structure, IIPA favors tailored legislation as that in the House Bill and the local ordinances to address the illegal camcording phenomenon in the Philippines.

Lack of Effective Enforcement on the Internet: As Internet piracy flourishes in the Philippines, the enforcement infrastructure needs to catch up with the technology. In 2008, there were no known investigations into or actions taken against Internet piracy in the Philippines. The E-Commerce Law establishes important legal principles for liability (i.e., contributory and vicarious liability are codified in the law), but there is no statutory notice and takedown to date in the law. Such a mechanism should be added, but in the meantime, the Philippine government should remind the public that use of P2P networks by copying or distributing illegal files is copyright infringement, and it should launch a campaign aimed at stopping Internet infringements. Blatant commercial Internet pirates advertising hard goods or downloading for loading onto devices (including mobile devices) should be acted against like physical piracy. Service providers should take steps to stop or take down infringing activities or materials utilizing their services.

Mobile Device Piracy Enforcement Commences: During the last few months of 2007 and into 2008, the international recording industry group, the International Federation of the Phonographic Industry, working with the local music recording industry association (PARI), conducted market surveys of the mobile device piracy phenomenon and provoked enforcement actions against a chain of computer dealerships. IIPA calls upon the Philippine government to significantly step up its activities against this form of piracy in 2009.

Mall Piracy Starting to Move Underground; More Action and Accountability Needed: In 2008, industry saw the beginnings of movement of mall piracy out of public view at some of the piracy hotspots like Virra Mall, Greenhills Shopping Center in San Juan, and Circle C Mall in Project 8, Quezon City. However, piracy remains at those sites; it is just hidden from view and operated by runners. The Philippine government must adopt a zero tolerance policy, and warn mall owners (and where relevant, retail mall merchants) that they will be held accountable for failing to stop piracy in the malls. They should follow President Gloria Macapagal Arroyo's letter memorandum of November 16, 2006, which called upon the government to "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," and to "[c]onsider, 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." Passage of the Bills already introduced into the House and Senate would further enhance the

⁹ An Act To Prohibit And Penalize The Unauthorized Use, Possession, And/Or Control Of Audiovisual Recording Devices For The Unauthorized Recording Of Cinematographic Films And Other Audiovisual Works And/Or Their Soundtracks In An Exhibition Facility, Providing Penalties Therefor, And For Other Purposes.

government's ability to address mall piracy by confirming secondary liability for mall owners that contribute to, or control and financially benefit from, piratical activities occurring in leased premises on their properties.

No More Optical Disc Licenses Should be Issued by OMB, and Policing of Licensed and Unlicensed Plants Must Ensnare: Since the Philippines now suffers from over-capacity to produce CDs, DVDs, CD-ROMs and burned CD-Rs and DVD-Rs, the government should immediately cease granting licenses for new plant production. On top of this, the government should follow President Arroyo's missive in her November 2006 memorandum to "[i]ntensify regular and effective ... raids and 'spot' inspections on factories that produce illegal optical discs, trademarked and copyrighted goods, ... seizure and destruction of pirated and counterfeited goods and equipment used to produce them, and ... arrests and prosecutions leading to deterrent level sentences served." OMB's record in 2008 was not as good as 2007, as they were reluctant to undertake many enforcement actions against illegal replicating plants or to allow the industry representatives to inspect the authorized replicating plants (although over five million pieces were seized, arising from more than 1,800 inspection orders). The OMB also failed to carry out arrests, as it does not have the budget or infrastructure to detain offenders. As a result, enforcement against pirate hard goods CD/DVD businesses diminished in 2008. Most OMB operations are inspection orders (as opposed to search warrants, which, as noted, are very difficult to obtain). Largely due to budget restraints, the OMB rarely operates outside Metro Manila, although they did hit some retail raids regularly in notorious shopping areas such as Metrowalk and Makati Cinema Square and Quiapo.

OMB Should be Properly Funded to Enhance Its Operational Capacity: The Philippine government should finally deal with the serious under-funding of OMB (with Edu Manzano as Chairman in a holdover capacity since his three-year term expired in 2007). The OMB's total budget for 2008 was P27 million (US\$570,000), including funds for salaries, capital outlays and Maintenance and Other Operating Expenses (MOOE), with the MOOE budget set aside for investigations and raids making up P11 million or US\$232,000. This is insufficient to effectively conduct anti-piracy operations throughout the entire country, and since the MOOE budget is also supposed to cover overhead including rental (which requires P5 million or US\$105,500), electricity, travel, communications, and office supplies, it is clear OMB (which now has only around 20 approved positions) faces an impossible task. In the past, OMB was granted Malacanang Intelligence Funds of P5 million, but for the past two years, OMB has not received any funding from this source. The OMB also received P500,000 (US\$10,500) from the Metro Manila Film Festival in 2008.

Linking Piracy With Organized Crime: IIPA has long called upon the Philippine government to get serious about piracy and its connection with organized criminal behavior. The Philippines should enact a statute such as that in Hong Kong (the Organized and Serious Crimes Ordinance), or other models, including a mechanism by which to trace and seize assets tied to various crimes, including crimes involving copyright or other IP.

Curb Pay TV (Cable and Satellite) Piracy: In 2008, very little progress was made against rampant pay TV piracy in the Philippines, and court processes in the cases going forward have revealed serious flaws in the judicial system. Past complaints of cable piracy laid with the National Telecommunications Commission (NTC) ran into difficulties, raising doubts as to whether the NTC could properly handle such copyright complaints. In 2007, a memorandum of agreement between the Intellectual Property Office and the NTC sought to clarify the situation with the NTC agreeing to first determine issues of copyright infringement. Seeking to capitalize on this new procedure in late 2007, the Motion Picture Association of America, on behalf of two of its member companies, first filed complaints of copyright infringement against Cable Link. It is disappointing that the complaints still remain with the IPO, and that the substantive issues of copyright infringement have not yet been addressed; rather, the right holders have had to spend most of their time to date complying with onerous procedural requirements. It was hoped that the MOA would have led to NTC invoking its authority to revoke licenses of operators that utilize pirate programming, however, to our knowledge, NTC has done little to stop rogue operators.

In another case, *Juliano-Tamano et al v. Discovery Communications, Europe et al*, an initial decision by the Secretary of the Department of Justice that there was no broadcast right in the Copyright Law of the Philippines,¹⁰ was reversed in October 2007.¹¹ Unfortunately, the Court in Cotabato City has refused to set a hearing for the case, and in the meantime, the defendant has appealed to the Supreme Court to reinstate the initial decision of the DOJ Secretary. Other cases are being explored using the IP Philippines' Bureau of Legal Affairs, which has the power to undertake administrative action on IP complaints, but to date, there have been no positive resolutions in any pay TV piracy cases.

TRAINING AND PUBLIC AWARENESS

IIPA members continued to provide and participate in various public awareness and training activities in the Philippines in 2008 and already have additional trainings planned in 2009 for prosecutors and law enforcement agents. Past trainings have included sessions on illegal camcording, bringing successful prosecutions in the Philippine courts, and adequate software asset management. The following is a non-exhaustive list of industry trainings:

- On April 17, 2008, the Business Software Alliance conducted trainings in Quezon City for 16 new officials of the Philippine National Police's Anti-Fraud and Commercial Crimes Division, on IP Laws and Licensing Guidelines.
- In July 2008, the BSA partnered with IPO and the U.S. government to support the establishment of specialized IP courts in the Philippines.
- On July 2, 2008, BSA representatives conducted trainings in Quezon City for 25 agents of the OMB, as part of a PAPT Seminar on IP Laws and Licensing Guidelines.
- On January 5, 2009, BSA representatives conducted training for thirty-five participants as part of a PAPT Technical Training on conducting corporate end-user routine inspections and briefing of targets at the OMB Office in Quezon City.
- The MPAA conducted training throughout the year for enforcement authorities and theater personnel on anti-camcording measures.

IIPA is also aware and was supportive of two specific U.S. government training programs. In one, the U.S. Agency for International Development project ROLE (Rule of Law Effectiveness) assisted the OMB in formulating Administrative Rules and conducted a training session for OMB operatives in early 2008. USAID also assisted the OMB in producing a Licensing Manual, although the Administrative Rules and Licensing Manual do not appear to be in use by OMB. In November 2008, the U.S. Commerce Department's Commercial Law Development Program (CLDP) worked with Intellectual Property Office (IPO) on a Judges Colloquium since the Philippines is getting its specialized IP court up and running. BSA partnered with the IPO to bring Judge Jayin Sunthongsingkarn (Judge, Thailand IP&IT Court) to share his experiences and the benefits of having a specialized IP court. The Judges Colloquium was well attended and the Chief Justice of the Supreme Court, in a keynote address, offered support for specialized IP courts in the Philippines. An opening plenary day (November 26) was followed by a two-day workshop, including mock trials on IP (patent, trademark, copyright) with judges from the Philippines, Thailand (the IP&IT Court), Malaysia (IP court), and Taiwan (IP Court) invited.

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. 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 2008. Under Presidential Decree 1986,

¹⁰ In *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), the Attorney General ruled that broadcasters do not have standing to sue since they are not the requisite holders of the programming, and ruling that

¹¹ *Juliano-Tamano et al v. Discovery Communications, Europe et al*, Resolution, October 10, 2007.

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

Enact WIPO Treaties Implementation and Other Needed Amendments: Copyright protection is governed under Republic Act 8293, the Intellectual Property Code (IPC) of the Philippines (in force January 1, 1998). The Philippine government has, even before but especially 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).¹² The latest attempt is contained in Senate Bill 880 (sponsored by Senator Edgardo J. Angara), and House Bill 3741, which are virtually identical to bills proposed in previous Philippine Congresses. IIPA strongly supports passage of SB 880 and House Bill 3741, with a few modifications.¹³ 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."

The Senate 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, would result in one of the most modern copyright laws in the world. President Arroyo's 2006 letter memorandum to enforcement agencies implored the legislature to pass modernizing legislation: "[c]ontinue 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."

¹² In respect of the addition to the copyright bill which would impose mall liability, we understand that Senator Manny Villar has been opposed to this provision. IIPA notes that President Arroyo issued a directive for 2008 instructing the IPO to consider Mall owner liability and included that in their action plan for the year. IIPA representatives would be pleased to sit down with Senator Villar to address any concerns he may have with the mall owner liability provision, which simply confirms liability for indirect infringement when the mall owner knows about and materially contributes to infringing activity.

¹³ 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, one provision in need of clarification concerns the exclusivity of the "making available" right for 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... ."

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."

In the 1990s, the music market in the Philippines saw enormous growth in the market share for local music. It is no coincidence that such changes occurred when the Philippines adopted better copyright laws and saw increases in enforcement activity.¹⁴ A study of the Business Software Alliance and IDC estimates that for the Philippines, a 10-point reduction in the current piracy rate would yield additional US\$32 million (Php1.3 billion) in tax revenues and US\$623 million (P25.3 billion) to the economy, create 2,200 new IT jobs and increase local vendor revenues by US\$431 million (P17.5 billion).¹⁵ Other creators in the Philippines, e.g., film makers like Gerardo De Leon,¹⁶ Ishmael Bernal,¹⁷ Eddie Romero,¹⁸ 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*;¹⁹ writers like Nick Joaquin,²⁰ Edith Tiempo,²¹ and Virgilio Almario;²² musicians like Antonio Molina,²³ Jose Maceda,²⁴ and Ernani Cuenco,²⁵ as well as those involved in entertainment software development,²⁶ all stand to reap the benefits of better copyright protection in the Philippines.

Enact Anti-Camcording Legislation: Anti-Camcording Legislation: IIPA also calls upon the government to enact House Bill 4117, the Anti-Camcording Act of 2008, which is discussed above. This legislation will 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.

¹⁴ 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).

¹⁵ 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>.

¹⁶ 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.

¹⁷ 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.

¹⁸ 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").

¹⁹ The Philippines has a rich tradition of motion picture production, including the films of the late Lino Brocka.

²⁰ 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.

²¹ 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.

²² Among his 10 books of criticisms and anthologies are *Ang Makata sa Panahon ng Makina*, *Balagtismo 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.

²³ 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.

²⁴ 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.

²⁵ 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.

²⁶ 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).

Make Adjustments to E-Commerce Law, E.g., Add Statutory Notice and Takedown: At present, the E-Commerce Law establishes that service providers can be liable for direct infringement, for inducing or causing another person or party to commit any infringement or other unlawful act, or vicarious infringement, i.e., knowingly receiving a financial benefit directly attributable to the unlawful or infringing activity. It also provides in turn a limitation on liability for service providers who “merely provide access” to an “electronic data message or electronic document” that infringes copyright, provided that the service provider does not have actual knowledge of infringement, or is not aware of the facts or circumstances from which infringement is apparent. These provisions are helpful in setting forth important copyright liability principles. However, the law does not provide for a statutory notice and takedown system. Instead, service providers must only abide by “injunctive relief issued by a court ... requiring that the service provider take or refrain from actions necessary to remove, block or deny access to any material, or to preserve evidence of a violation of law.” A systematic and effective approach to address the problem of Internet piracy should be adopted in the Philippines as to intermediaries such as ISPs as well as websites or people providing or facilitating distribution or access to pirate materials. Such a legal system should include a notice and takedown system similar to that in effect in many countries, whereby service providers take down or block access to infringing material or activities or block access to users engaging in infringement: if they know of infringement; are aware of circumstances from which infringement is apparent; or are notified of alleged infringing activity.

Government Legalization: Regarding government acquisition of legitimate software, Executive Order No. 262, 2000 entitled “Providing Policies, Guidelines, Rules and Regulations for the Procurement of Goods/Supplies by the National Government” was promulgated. The EO prohibits government from purchasing illegal software and allows only suppliers of legitimate software to participate in government bidding, but the EO has yet to be fully implemented. The State budgets allocated for government procurement of IT products simply does not enable the bundling of legitimate software.

Ensure Rights Holders are Properly Consulted Regarding Any Moves Toward Collective Licensing or Implementation of Fair Use Guidelines as Regards Published Materials: The Philippine government recently announced the formation of FILCOLS to act as a collecting society for publishers and authors. Any move toward establishing such 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. Such a society's practices must conform to certain criteria for any such organization, including that collective licensing must be voluntary, must not interfere with market forces and must permit adequate, appropriate and fair remuneration to publishers and authors, must not set arbitrary percentages for licensed uses (e.g., 10% of a chapter or book), and should not result in condoning the practices of copyshops. The Philippine government must also engage in a transparent consultation process regarding any developments toward the adoption of fair use guidelines.

Avoid Burdensome Restrictions on Collective Management of Music Rights: Draft Guidelines for the Accreditation of Collective Management Organizations issued by the IP Office are currently being considered. These Draft Guidelines could create significant barriers to the effective collective administration of rights in music. Some of the ideas being considered or proposed during public meetings, including obligatory pre-approval of tariffs and mandatory accreditation of collective management bodies, would be detrimental to existing licensing mechanisms for music. The Philippine government must avoid restrictive rules that would result in a dysfunctional licensing market.

Other Draft Legislation: There are several other copyright-related bills being considered by the current Congress. IIPA 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 states its support for 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. The IT Panel of Congress' Technical Working Group also recently recommended the adoption of the APEC model on data privacy, which has been introduced as a Data Privacy Bill (HB 03828). BSA plans to submit its formal Position Paper on the draft bill in due course.

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 2007, almost \$1.2 billion of goods, or 12.4% of all goods imported in the United States from the Philippines, enjoyed duty-free treatment under the GSP code. In 2008, more than \$913 million of goods, or almost 10.5% of all goods imported in the United States from the Philippines, enjoyed duty-free treatment under the GSP code. IIPA is considering recommending a review to determine whether the Philippines meets 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.