

THE PHILIPPINES

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that the Philippines be elevated to the Priority Watch List and that USTR conduct an Out-Of-Cycle Review (OCR).¹ IIPA commends the government of the Philippines for its work in addressing computer software piracy. Nonetheless, our recommendation that the Philippines be elevated is made in light of the continuing, and mounting, problems faced by other copyright industries. The OCR would be to assess whether progress has been made in reducing piracy and passing pending legislative initiatives.

Background to Recommendation: The Philippines is currently undergoing an Out-Of-Cycle Review (OCR) to determine whether it should remain on the Watch List or be elevated to the Priority Watch List. On November 9, 2009, IIPA reported that, while there is potential for positive change, piracy remains dominant in the market, and the situation in the Philippines has not improved significantly since IIPA's February 2009 Special 301 report. Therefore, IIPA recommended that the Philippines be placed on the Special 301 Priority Watch List. Our view has not changed. IIPA recommends conducting a review to determine whether the Philippines qualifies for benefits under the Generalized System of Preferences trade program, under which more than \$733.6 million of Philippine goods, or 10.8% of the Philippines' total imports to the U.S. in 2009, enjoyed duty-free access to the U.S. market.

Executive Summary: The 2010 election cycle in the Philippines nears, with the election to be held May 10, 2010. In the area of copyright protection, much has been left unfinished by the current Administration and Congress. The agenda includes passage of copyright amendments, the original drafts of which were introduced in the Congress more than a decade ago, and signing into law legislation to ban illegal camcording of movies in theaters. The agenda also includes dealing with specific piracy phenomena and streamlining the enforcement system, through the issuance of search warrants without fear of quashing the warrant, coordinated raids including *ex officio* actions, and deterrence-building criminal prosecutions. At the same time, key posts in the government are being or have already been vacated, including departures of the prior Chairman of the IPO Philippines, the prior Chairman of the Optical Media Board, and the IP Department of the National Bureau of Investigation (NBI). Thus, a new leadership comes on the job with major tasks ahead of it.

Copyright piracy remains a significant barrier to legitimate trade in copyright materials in the Philippines, causing losses to all the industries.² Piracy phenomena abound, including growing Internet piracy, software end-user piracy in businesses, mobile device piracy, book and journal piracy, illegal camcording of movies in theaters (which turn up as DVDs on the streets or on the Internet), retail shop and mall piracy, Pay TV theft, and some remaining pirate optical disc production being imported or exported. To combat these problems, industry works with the Philippine National Police (PNP), the National Bureau of Investigations (NBI), the Optical Media Board (OMB), all of which comprise the Philippine Anti-Piracy Team (PAPT). All these agencies provided some support for anti-piracy activities in 2009, including raids on retail piracy and companies engaged in end-user piracy of business software. The IPO Philippines reported seizures out of raids through June 2009 which matched the entire seizure numbers for

¹ For more details on the Philippines' Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

² For example, business software piracy losses increased from US\$121 million in 2008 to US\$126.4 million in 2009, while business software piracy levels increased during the same period from 69% to 71%. This represented increased losses due to business software piracy for the fifth straight year, while the piracy level remains above the regional average. Music and record industry piracy losses and levels have always been high in the Philippines, at US\$112.1 million in 2009, slightly down from US\$117 million in 2008. The piracy level remained steady in both years at 83%. The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2010 Special 301 submission at www.iipa.com/pdf/2010spec301methodology.pdf. BSA's 2009 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in the Philippines. They follow the methodology compiled in the Sixth Annual BSA and IDC Global Software Piracy Study (May 2009), available at <http://global.bsa.org/globalpiracy2008/index.html>. 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.



2008. While such seizure numbers are commendable, problems in the enforcement system remain, including difficulty in obtaining search warrants in cases of known or suspected piracy activities, and the ease of them being quashed; and the failure to establish IP courts, which in part may be responsible for the paucity of cases resulting in criminal convictions.

Priority Actions Requested in 2010: IIPA requests the following actions in the Philippines, 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 and that they are not easily quashed.
- Remedy enforcement bottlenecks, including inquests and preliminary investigations by the Department of Justice by streamlining signing procedures.
- Develop IP expertise in judges and prosecutors and re-establish specialized IP courts, with the goals of increasing speeds of dockets and enabling a significant number of cases, including criminal cases, to move forward in the system.
- Maintain raiding on suspected business software end-user piracy targets; run surprise and transparent inspections on all (licensed or unlicensed) optical disc plants and CD-R burning operations in cooperation with industry; take enforcement against piracy activities in the malls and against pirate book and photocopy shop operations both on and off university campuses; prosecute cases involving illegal camcording of movies in the movie theaters; and shut down some of the estimated 800 pirate cable systems, revoking their licenses or permits.
- Investigate and eradicate P2P and other Internet-based piracy, implement and improve current laws (like the E-Commerce Law), and draft and enact legislation to facilitate removal of infringing material or services from the Internet through fostering ISP cooperation and implementing an effective notice and takedown system.
- Issue implementing rules for the penal provisions of R.A. 8792, particularly on piracy.
- Provide funding for OMB verification visits, and allow right holders to participate in OMB plant visits and other investigations and accompany inspectors.
- Permit voluntary music collective management organizations (CMOs) to commercially operate without interference from the government.
- Launch measures to reward good and honest government work and work to eradicate corruption and compromises in IP enforcement (and take action to punish offenders).

Legislation

- Pass as a matter of first priority an IP Code amendment Bill (SB880) aimed at implementing the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) and making other positive changes.
- Finalize national legislation (HB5699, which passed third reading in February 2009, and SB3529 which passed third reading in January 2010) to halt illegal camcording of motion pictures, and promote and support implementation of the law and city ordinances through training for PAPT officers.

PIRACY AND ENFORCEMENT CHALLENGES IN THE PHILIPPINES

Criminal Court System Remains Dysfunctional and Non-Deterrent; Special IP Courts Needed: Starting with the criminal inquest procedure at the Department of Justice, and ending with criminal trials, 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 extended trial period, many problems often arise, including the transfer of prosecutors and judges, eliminating any institutional memory of the case; the use of delay tactics by defendants' counsel 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. The expense and delay of seeking a judicial remedy, coupled with the recent warrant quashals, discourages private right holders from bringing civil cases. Defendants understand this and therefore also stand in a strong position when it comes to any criminal proceeding or settlement discussion.

No criminal copyright convictions were secured prior to 2002 for copyright piracy, and since 2002, there have only been five convictions under the Copyright Act.³ To our knowledge there were no criminal convictions in 2009 for copyright piracy. Out of 132 raids run against motion picture piracy and business software end-user piracy in 2009, there were 89 pending criminal cases by the end of the year with no results. The largest criminal fine ever imposed in the Philippines for copyright piracy was a modest P200,000 (approximately US\$4,300). While two defendants were sentenced to one year in prison or more, in the case involving blatant and massive book piracy, the defendant absconded and remains at large. Unfortunately, law enforcement agencies/police have little interest in locating and apprehending the defendant who absconded. One major step which IIPA believes will make a difference would be the establishment of the long promised specialized IP courts in the Philippines, including criminal trial courts, in line with the President'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 would ensue. IIPA understands that the Intellectual Property Office held a public hearing for stakeholders on August 10, 2009 to discuss the establishment of new rules to govern IP litigation, with the proposed rules also addressing the creation of two or three pilot IP courts with national jurisdiction. The proposed rules were presented by IPO to the Chief Justice of the Philippine Supreme Court at the 2009 IP Colloquium for the Judiciary on October 23, 2009. As of mid-February 2010, to IIPA's knowledge, the special rules have yet to be approved by the Supreme Court. Though the timetable is uncertain, the courts should be made functional as soon as possible.

Effective Search Warrant Procedure in Copyright Cases Needed to Avoid Unjustifiable Quashals:

One of the most problematic 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 latest example was the 2008 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. Previous cases included the Telmarc Cable case,⁴ coming on the heels of the search warrant quashal in the Solid Laguna decision,⁵ which 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"

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THE PHILIPPINES: CRIMINAL COPYRIGHT CASES RESULTING IN CONVICTION 2002-2007	
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 Basherón & Alinor Pangcatan Y Abobakar	13 November 2006 (RA 9239: Optical Media Act of 2003)
PP v. Asmawe Tantowa, Abdulah Mama, Maraquee 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)

⁴ *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/SPEC301PHILIPPINES.pdf>.

⁵ *Sony Music Entertainment (Phils), et al v. Hon. Judge Dolores Español et al*, G.R. No 156804, March 14, 2005.

[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.

These decisions are inconsistent with the Supreme Court's own decision in the Columbia case,⁶ which held that affidavit evidence is sufficient to uphold the requirement of "probable cause" to obtain a search warrant and which the government has stated on numerous occasions is controlling precedent. Without the availability of a search warrant remedy – a TRIPS requirement – progress cannot be made in piracy cases in the Philippines. Search warrants, raids and follow up prosecutions should be obtainable on a transparent, reasonable and timely basis, and should not be quashed without full transparency and notice to rights holders. It is also increasingly important to get the courts to issue multiple warrants needed to conduct a thorough search of rows of retail stores selling pirated discs, where the violation of the law is obvious. Judges have hesitated to issue multiple warrants.

Camcording Piracy: The Philippines has become a regional hotspot for illegal camcording of movies at cinemas. The number of instances of illegal camcording forensically matched to the Philippines in 2009 was 21 while there were 44 additional instances in 2008. Philippine movie pirates engaging in this activity typically 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.⁷ Infringing copies of U.S. motion pictures forensically linked to illegal copies made by camcorders in Philippine cinemas are distributed globally. Pirate versions sourced from illegal camcording are often available just two or three days after the theatrical release in the Philippines. This piracy has had a devastating impact on the life cycle of many 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.

In terms of enforcement, the local Metro Manila and Quezon City governments, and some government officials (e.g., the former head of the OMB) were early to recognize the scope of harm caused by illegal camcording, and IIPA recognizes their efforts to curtail it through targeted enforcement, and the issuance in Manila and Quezon City of local ordinances in 2008 making it illegal to use an audiovisual recording device in a movie theater. Legislation to ban camcording in theaters passed a third reading in the Philippine House of Representatives in February 2009 and in the Philippine Senate in January 2010. The bills must now be reconciled and forwarded to President Macapagal-Arroyo for signature. It would be highly disappointing if this bill did not become law. Swift and immediate enforcement actions should ensue against illegal camcording in 2010; we are aware of eight interdictions resulting in five arrests in 2009. We are not aware of the status of any prosecutions, however. IIPA also welcomes NBI's effort to create a complaint mechanism for illegal camcording. IIPA appreciates these efforts by the government, and views passage of the camcording bill as indispensable as it would, if enacted, specifically define the acts constituting unauthorized possession, use and/or control of audiovisual recording devices; and ease judicial enforcement easier since it would obviate the need to prove copyright infringement or provide evidence as to the subsistence or ownership of copyright.

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 2009, thereby stunting the growth of the information technology sector. The piracy rate, estimated to be 71% in 2009, remained high compared to the regional median for Asia (which was 61% in 2008). Studies have shown that reducing the piracy level by ten percentage points in the Philippines will lead to job creation, likely in the thousands, the generation of significant tax revenues and greater contribution by the software industry to economic growth in the Philippines.⁸

⁶ 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).

⁷ For example, in 2008, *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.

⁸ See *The Economic Benefits of Reducing PC Software Piracy A Report by IDC*, January 2008, at http://www.bsa.org/idcstudy.aspx?sc_lang=en.

The business software industry continued to receive good cooperation from PAPT in 2009, as PAPT conducted a number of end-user raids in 2009 which were successful in terms of items and value of illegal software seized. In addition, the OMB made visits to thirty companies suspected of using unlicensed Business Software Alliance-member software. The visits were not confined to Metro Manila and these efforts benefited software companies in terms of legalization of software usage inside businesses. One minor problem BSA encountered is that the Philippine National Police (PNP) has a lengthy approval process to apply for search warrants, depending on the availability of superior officers to sign the clearance. The establishment of IP courts will make this process easier. The Intellectual Property Rights Department (IPRD) of the NBI has new officials, namely, Atty. Dante Bonoan (Chief, IPRD) and Atty. Joel Tovera (Executive Officer, IPRD). The appointments of these two officials is a welcome development and their performance will be closely monitored by stakeholders in the coming months. The BSA has done two corporate end-user raids with the IPRD under Attorneys Bonoan and Tovera and the results are encouraging. IIPA hopes that with the appointment of a new OMB Chairman, Ronnie Ricketts, and these new NBI-IPRD officials that BSA will receive continuous support in 2010.

Internet Piracy: Internet usage in the Philippines continued to explode in 2009. The Philippines was fourth in the world in growth of broadband connections (12%) between the second and third quarters 2009, according to Point-Topic, adding over 500,000 broadband subscriptions in the year ending October 1, 2009 (growth of 12.32%), to reach a total of almost 1.5 million broadband subscribers.⁹ A recent study by Universal McCann noted there were 37 million regular social networking users in the Philippines.¹⁰ It is therefore not surprising that Internet piracy worsened significantly in 2009, 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 textbooks, reference books and trade books placed onto CD-Rs). Previously, a high percentage of Internet access to infringing sites occurred through the use of Internet cafés; thus, piracy activities online were limited geographically and to certain demographics. Now, high-speed Internet direct-to-home connections and connections through a wireless LAN have become popular, as have inexpensive plug-in USB LAN devices. In addition, the proliferation of low-cost notebook computers and “wi-fi” hot spots has resulted in more people gaining access to the Internet in the Philippines.

The music industry experienced a 19% decrease in legitimate physical sales, which can be attributed at least in part to Internet piracy, and which was not replaced by legitimate Internet sales. It is also somewhat ironic that physical piracy of music (e.g., on CDs) has declined due to rising Internet piracy. From a commercial standpoint, the physical market still exists, but the focus of pirate product in physical disc format is on older established acts, meaning younger acts are being illegally downloaded on the Internet, which in turn makes it more difficult or impossible for them to break into the legitimate market. In addition, the Internet has become the source of choice for mobile device pirates and for burning onto recordable discs, and conversely, camcording pirates use the Internet to upload their pirate motion picture captures.

The legal framework and enforcement infrastructure to deal with Internet piracy in the Philippines rapidly needs to catch up with the technology. 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 (without relying on court-issued relief) in that law or the Philippine IP Code. Such a mechanism, as well as fostering cooperation with service providers to effectively deal with infringing websites and services and P2P piracy activities including effective and fair termination policies for repeat infringers, should be added. As it stands, those in the Philippines who offer broadband all freely allow P2P downloading.

In the meantime, existing enforcement authorities should launch a campaign aimed at stopping Internet infringements. The CICT (Commission on Information and Communications Technology) states among its declared policies the establishment of “a strong and effective regulatory system that fosters competition and protects

⁹ See Fiona Vanier, *World Broadband Statistics Q3 2009*, PointTopic, December 2009, at 19, 25.

¹⁰ 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>.

intellectual property rights.” IIPA members would welcome the CICT’s involvement in combating Internet-based copyright infringements. While industry notes that many of the infringing sites or services are hosted and registered outside of the Philippines, it remains incumbent on the government to act. A proactive approach, including takedowns and blocking sites engaged in blatant and serious piracy activities, has been successful in other markets in curtailing online infringing activities. In addition to enforcement against Internet-based infringements such as P2P file sharing, attention should be paid to enforcement against blatant commercial pirates who advertise hard goods or downloading for loading onto devices (including mobile devices).

Mobile Device Piracy: Mobile device piracy similarly exploded in the Philippines in 2009, as it now estimated that there are over 68.1 million mobile phone subscriptions, representing a 75.9% penetration rate.¹¹ 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, especially medical and nursing titles and trade books, etc.) onto mobile telephones, MP3 devices, flash drives, recordable optical discs, and even computer hard drives. There are also increasingly infringing wireless application providers (WAP) which provide pirate content directly through wireless communications onto mobile phones/devices. There has been very little enforcement taken against mobile device piracy in the Philippines. The Philippine government must formulate an anti-piracy enforcement plan targeting piracy activities over mobile networks. While the copyright industries in the Philippines have legitimate business with all three major telecommunication companies, it has been difficult to convince telecommunication companies to block access to pirate sites on a voluntary basis. IIPA recommends empowering the National Telecommunication Commission (NTC) or the CICT to act on piracy and other copyright issues over mobile networks, or enhancing anti-piracy enforcement work carried out by OMB by including mobile device piracy within their purview.

Book and Journal Piracy: Illegal commercial-scale photocopying and the scanning and conversion of entire books into digital files are the predominant piracy problems facing the publishing industry in the Philippines. The industry is also seeing an increase in online piracy, particularly of medical textbooks, professional books, and trade books. Photocopy shops continue to operate with impunity in and around college, medical, and nursing school campuses due to a lack of action by law enforcement authorities. The large number of college and graduate students in the Philippines results in high demand for university textbooks, technical books, and professional medical and nursing books. Unfortunately, much of this demand is being met through illegal photocopying, and increasingly through downloads of unauthorized digital copies of books onto mobile devices. Pirates also burn CD-Rs with up to 100-200 titles on each disc. The “university belt” in Metro Manila is a notorious venue for illegal photocopying activities. Copy shops also operate in and around hospitals, and near government regulatory agencies. Vendors of pirated books have also taken to selling the infringing products door-to-door at doctors’ offices, medical establishments, and trade fairs. Many shops now operate on a “print-to-order” basis, thus avoiding stockpiles of infringing goods in their establishments and thereby complicating investigations and enforcement actions. The Department of Education and, in particular the Commission on Higher Education should take a more active role in encouraging institutions of higher learning to adopt appropriate copyright policies and encourage the use of legitimate materials at colleges and universities.

OD Replication for Export: The Philippines is somewhat unusual in its pirate consumption habits since it both imports pirate discs (mainly from China) as well as having excess production capacity in the country. In 2008, exports from the Philippines of pirate CDs, DVDs, and CD-ROMs were once again detected. Local production reportedly makes up an estimated 40% to 50% of hard goods found in the domestic market. The total number of licensed plants already has a production capacity which exceeds legitimate demand, and the Philippine government should conduct verification checks on licensed premises. The number of underground plants and their total capacity is unknown. Only one underground plant was reported to have been raided in 2009, but due to legal maneuverings and a rift between the OMB and the President’s Anti-Smuggling Group (PASG), the machines found at the raid site

¹¹ Point-Topic, *The Philippine Broadband Overview*, October 7, 2009, at <http://point-topic.com/content/operatorSource/profiles2/philippines-broadband-overview.htm>.

were returned to the owners by the Court without the knowledge of OMB. The owners were not even required by the Court to obtain a license to possess, let alone operate, machines, both of which require OMB licenses. The Courts should keep the OMB involved where there are replicating machines, and in this case, should not have released the machines since the OMB had not granted the Respondents a proper license. This has been overlooked by the Courts in the past, which have returned seized machines to unlicensed enterprises without informing the OMB.

In terms of enforcement, IIPA commended President Macapagal-Arroyo for her November 2006 memorandum on IP enforcement, which directed her agencies 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.” To effectuate the President’s direction to raid and inspect factories, the government should properly fund OMB’s verification visits. IIPA urges OMB to provide transparency as to information related to the licensed facilities. IIPA also urges OMB to pay surprise visits to all optical disc plants in the presence of witnesses from the private sector. According to industry, there are plants which have not been visited for more than a year. Some plants have been reported by OMB to be non-operational and in the process of being sold, however, there is no evidence to suggest that these “non-operational” factories which have been up for sale for some time have actually taken concrete steps to sell the factories. In one case, a plant continues to occupy its rented factory space, and recently renewed its three-year lease agreement with its lessor.

Industry appreciates the new OMB Chairman’s interest in combating piracy and looks forward to working with him to chart a course for effective inspections and then enforcement against any irregular activities detected. A critical aspect of this process which has been missing is adequate funding for OMB to operate effectively. The Philippine Congress has never taken the important step of properly funding the OMB, but should now do so to provide the new Chairman with the tools for effective enforcement.¹²

Retail and Mall Piracy: Although it was noted above that the rise in Internet piracy has led to a reduction in physical piracy for some industry sectors, several areas of the country are still plagued by retail pirate trade. For example, Manila’s Quiapo district remains a center for OD pirate trade, Davao’s pirate trade has largely been untouched, and Cebu City remains a major hub in the operations of pirates in the Visayas. The sale of pirate and counterfeit optical media also remains unchecked in Antipolo, Dasmariñas, and Cagayan de Oro. In addition, retail piracy of software and games can still be observed in Makati Cinema Square (Makati City) Metrowalk (Pasig City), and practically every mall in metropolitan Manila. Market intelligence also suggests an increase of locally burned pirated discs (including a recent proliferation of pirate DVD-Rs) from Quiapo Barter Trade complex. Also, it should be noted that while 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, pirate DVDs remain at those sites, but are now sold in a clandestine fashion through the use of runners, while music, software and games are openly sold on discs or offered for downloading.

With regard to enforcement, due to the fact that industry is not often invited to participate in investigations (end-user piracy investigations are an exception to this), IIPA has little information except what has been provided by the government. On June 23, 2009, the IPO of the Philippines reported enforcement statistics for January to June 2009 on its website, including over three billion pesos (about US\$65 million) worth of “counterfeit goods and paraphernalia” seized between January and June 2009. This includes, according to IPO, “three replicating machines, with a total estimated value of P200 million (about US\$4.3 million) which was intercepted during an operation jointly undertaken by the Bureau of Customs (BoC) and Optical Media Board (OMB) in May 2009.” The PNP reportedly had the greatest haul (over two billion pesos) followed by OMB, BoC, and the NBI.

¹² For example, the OMB’s total budget for 2008 was P27 million (US\$585,000), 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\$238,000. These amounts are wholly 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\$108,000), electricity, travel, communications, and office supplies, it is clear OMB (which now has only around 20 approved positions) faces a difficult task.

Unfortunately, some questions are left unanswered by these statistics, including the true value of the seizures given the lack of transparency. In addition, product seized is not broken down by category so it is impossible to tell what percentage is counterfeit (trademark) goods versus pirated goods. Nor do the statistics indicate the size and scope of the overall piracy market, nor the sources from which any pirate product was seized, i.e., small distributors versus source piracy operations. Further, since there is no reporting on any cases commenced out of the seizures or previous seizures, it is impossible to conclude whether these enforcement actions have had any deterrent effect on piracy operations. Without such follow-up, it is impossible to ascertain, for example, how many of those engaging in such piracy activities have been apprehended or whether they remain free to continue to engage in piracy activities.

Specifically with respect to mall piracy, IIPA recommends the adoption in the Philippines of a landlord liability law. Then, mall owners and retail mall merchants should be warned that they will be held accountable for failing to stop piracy in the malls. They should follow President Macapagal-Arroyo's 2006 letter memorandum 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."

Finally, as noted, judges should issue multiple warrants in order to conduct thorough searches of the hundreds of retail stores that currently sell pirated discs where violations of the law are obvious.

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 ten brands have sought licenses from music publishers, but there are still many that do not, thus violating the Philippine IP Code for failure to pay proper royalties. Exacerbating the problem are a few manufacturing companies which slap USB ports onto their karaoke machines which allow them or the owners of the machines to add unauthorized copies of 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 that revenue losses are declining somewhat due to investment in digital technology by the leading cable provider but that there remain over 900,000 illegitimate Pay TV connections in the Philippines, and in addition, under-declaration by Pay TV operators continues to sink legitimate revenues.

In 2009, very little progress was made against Pay TV piracy in the Philippines, and court processes in the cases going forward have revealed 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 (MOA) 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, filed complaints of copyright infringement against Cable Link. It is disappointing that the complaints still remain with the IPO Philippines, 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 NTC to invoke 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 IP Code of the Philippines, was reversed in October 2007.¹³ Unfortunately, the Court in Cotabato City has refused to set a hearing for the case, although it is positive that in December 2008, the Supreme Court rejected the defendant's appeal to reinstate the DOJ Secretary's initial decision. 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 final decisions reached by IPO in any pay TV piracy cases (although there has been a successful private outcome in one case).

Several Steps Are Needed to Make Enforcement Practices More Efficient: Right holders in the Philippines unfortunately face some unnecessary hurdles that result in inefficient enforcement and ease the way for pirates to escape accountability. First, right holder inquests and preliminary investigations by the Department of Justice are often delayed by purely bureaucratic signing procedures, as the Chief Prosecutor apparently has to sign off on every resolution issued by all prosecutors – not just members of the IP unit. Such processes should be streamlined and accelerated, as should processes involved in the filing of cases subsequent to a raid and during the litigation phase. In addition, a major hurdle in the Philippine enforcement system remains the fact that the PNP cannot act on an *ex officio* basis but must always act in conjunction with the Optical Media Board or on a right holder complaint. This should be remedied, and the authority should extend to PNP being able to initiate actions and seize infringing items on an *ex officio* basis. Finally, it remains the case that with certain exceptions (notably, the BSA reports they do participate in investigations with PAPT officials), copyright owners are not often permitted or invited to participate in investigations. As an example of this, in 2008, the OMB agreed to accredit PARI, the local music and record industry association, to help the PNP investigate violations committed by registered producers. However, nine months later, PARI's authority was suspended. Apparently, according to PARI, pirate producers have been releasing record albums without paying royalties and sell their products at very low prices (US\$1 versus the legitimate price of US\$4 or \$5).

Deal With Compromises in IP Enforcement Through Rewards for Good Governance: Stemming dishonest practices related to enforcement of IP (e.g., leaks in advance of raids, irregularities in investigation or post-raid procedures) has always proved to be a difficult task in the Philippines. IIPA recommends long-term solutions such as education and increasing compensation of government employees engaged in enforcement of IP. One short-term suggestion would be to introduce a reward and recognition program for those government employees who honestly do their jobs and for those who report irregularities.

COPYRIGHT LAW AND RELATED ISSUES

Enact WIPO Treaties Implementation Bill 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 government of the Philippines joined the WCT and WPPT in 2002 but has never completed the implementation process. The latest attempts are contained in Senate Bill 880 (sponsored by Senator Edgardo J. Angara in July 2007) and the House Bill 3741 from the 13th Congress, which are virtually identical to bills proposed in previous Philippine Congresses. IIPA supports many provisions of these bills,¹⁴ with only a couple of modifications.¹⁵ One of

¹³ 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 there was no broadcast right enumerated in the IP law. The decision was reversed as incorrect in *Juliano-Tamano et al v. Discovery Communications, Europe et al*, Resolution, October 10, 2007.

¹⁴ 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

the principal achievements of the Bill is that it would result in full and proper implementation of the WCT and WPPT. The Bill would update and expand the scope of copyright protections for the digital and online world. In particular, the legislation would expand the scope of the reproduction right to include temporary copies and would explicitly broaden the right to control all communications to the public, including by providing an interactive “making available” right for the digital world. The Bill also provides critical protections against circumvention of “technological protection measures” and protections against unlawful tampering or use of “rights management information.” The Bill would 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 mall-owner liability.¹⁶ However, most unfortunately, the Bill does not contain any amendments addressing ISP liability issues, including even notice and takedown.

The latest updates indicate a dim outlook for passage of the House and Senate bills since the 2010 election season has now commenced. The House version of the Bill was approved at the House Subcommittee level on August 11, 2009, after hearings. As of late 2009, the situation was not as good in the Senate where the Bill was stalled since its first reading in September 2007. It would be truly unfortunate if the Philippine Congress missed yet another opportunity to pass world-class legislation as was contained in the House and Senate bills.¹⁷

Make Adjustments to E-Commerce Law, E.g., Adding Statutory Notice and Takedown and Incentives to Cooperate Against Repeat Infringers: The E-Commerce Law 2000 (Republic Act No. 8792) 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 (e.g., in the

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 Macapagal-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.” 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-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.”

¹⁵ 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... .”

¹⁶ In respect of the addition to the copyright bill which would impose mall liability, we understand that Senator Manny Villar (now a Presidential candidate) has been opposed to this provision. IIPA notes that President Macapagal-Arroyo issued a memorandum in 2006, and a directive for 2008 instructing the IPO to pass mall owner liability. 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.

¹⁷ IIPA takes this opportunity also to note that the Philippines should enact an organized crime 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.

absence of court ordered relief) or policies to effectively and fairly address repeat infringers. 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. It should also, as discussed, provide incentives for ISPs to cooperate in investigations into newer forms of online piracy, such as P2P file sharing, torrent sites, cyber lockers, and should likewise ensure that ISPs have in place effective and fair policies to be applied to deal effectively with cases of repeat infringers.

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. The government should fully enforce this Order and avoid contrary proposals that have reportedly been considered which would restrict or create preferences as to technology choices by government agencies.

Enact Anti-Camcording Legislation: House Bill 5669, the Anti-Camcording Bill, which would prevent the unauthorized operation of audiovisual recording equipment in motion picture theaters while a motion picture is being exhibited, passed the House in a third reading in February 2009. While illegal copying is of course already a violation of the Philippines IP Code, 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. The corresponding Bill SB 3529 made its way through the Senate following a third reading and final reading in January 2010. The House and Senate versions of the legislation will be reconciled before being forwarded to President Macapagal-Arroyo for signature. IIPA urges swift signing of the Bill into law once reconciled and publication of the law in the official gazette which will have a very positive effect against illegal camcording in the Philippines and will set a positive example for the region and worldwide.

Enact Cybercrime Prevention Act: In January 2010, the House of Representatives passed on third and final reading House Bill 6794, known as the Cybercrime Prevention Act of 2009. It seeks to address crimes committed via the Internet such as child pornography, illegal hacking of websites, phishing, data fraud, and the like by imposing corresponding penalties.¹⁸ It is unknown whether this Act includes a provision on intellectual property similar to that contained in the Council of Europe Cybercrime Convention, but hopefully, the law will afford protection consistent with the COE Cybercrime Convention which contains a prohibition on transmitting copyright material on the Internet without authorization.

Ensure Transparency in the Consultations Regarding Any Moves Toward Collective Licensing or Implementation of Fair Use Guidelines as Regards Published Materials: In 2008, the Philippine government announced the formation of FILCOLS to act as a collecting society for publishers and authors. Though there appear to have been some discussions, efforts toward establishing a collective licensing model in the Philippines must at a minimum include an open and transparent consultation process with all affected foreign and domestic right holders regarding the parameters for such an organization. The collecting society's practices should conform to certain

¹⁸ Tom Noda, *Posts Tagged ' House Bill (HB) 6794 '*, January 21, 2010, at <http://computerworld.com.ph/tag/house-bill-hb-6794/>.

criteria, 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 copy shops engaged in unauthorized copying of books. The Philippine government should also engage in a transparent consultation process regarding the adoption of fair use guidelines. Despite protestations alleging lack of U.S. publisher interest and cooperation, it remains the case that U.S. publishers have yet to receive adequate information from FILCOLS as to the organization's structure and proposed licensing practices to allow publishers to objectively assess its viability as a reprographic rights organization.

Avoid Burdensome Restrictions on Collective Management of Music Rights, and Allow Collective Management Organizations to Operate Freely in a Commercial Manner: Unfortunately, in 2009, the Philippine government continued to take steps to get in the way of free contractual relations between music companies and collective management organizations (CMOs) which collect public performance royalties on the broadcast or communication to the public of sound recordings. Specifically, in 2008, IPO Philippines held consultations regarding the control of CMOs and forced them to stop their commercial operations. The chief record producers' licensing entity (MVP) has as a result been prohibited from conducting its licensing activities on behalf of record companies since October 2008. CMOs should be permitted to operate in a commercial manner, free from interference from the government.¹⁹

Other Draft Legislation: The Congress of the Philippines went on recess on February 5, 2010. Prior to that, there were several other copyright-related bills being watched by IIPA. 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 etc. 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. IIPA was concerned regarding reports of consideration of a Free Open Source Software bill which would require government offices to use open source software. Passage of that bill would deny technology choice regarding software usage and ultimately would stunt the growth of the IT industry in the Philippines.

MARKET ACCESS ISSUES

Restrictions on Advertising: Under Presidential Decree 1986, advertising on pay television is currently limited to ten minutes per hour of programming. Restricting advertisement placement tends 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.

TRAINING AND PUBLIC AWARENESS

IIPA members continued to provide and participate in various public awareness and training activities in the Philippines in 2009. Past trainings have included sessions on illegal camcording, bringing successful prosecutions in the Philippine courts, and adequate software asset management. The Motion Picture Association continued anti-camcording training for cinemas in the metro Manila area in 2009. BSA regularly conducts capacity-building seminars for judges, prosecutors and law enforcement. BSA has also recommends these judges, prosecutors and law enforcers to attend seminars abroad sponsored by other organizations. The BSA in cooperation with the American Chamber of Commerce and the IP Coalition held a capacity-building seminar and workshop on February 2009 which included participation by law-enforcement officials and Department of Justice Prosecutors, and involved a workshop to identify problems encountered during preliminary investigation proceedings by stakeholders. The prosecutors in

¹⁹ There was a set of Draft Guidelines for the Accreditation of Collective Management Organizations issued by the IP Office back in 2008. Those Draft Guidelines should be scrapped as having potentially been detrimental to existing licensing mechanisms for music.

turn also identified problem areas which must be addressed by law enforcers and stakeholders to ensure a smooth preliminary investigation process.

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 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. As noted, in 2009, more than \$733.6 million of Philippine goods, or 10.8% of the Philippines’ total imports to the U.S. 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.