

# THE PHILIPPINES

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that the Philippines be elevated to the Priority Watch List. Notwithstanding the enactment of a good anti-camcording law, the Philippine Government has not effectively implemented this new law or addressed other problems identified in IIPA's previous reports and IIPA's December 10, 2010 Out-Of-Cycle Review (OCR) submission.

Executive Summary: With a new President (Aquino) and Cabinet in the Philippines since June 2010, IIPA hoped that a new era would also emerge in the area of copyright protection, taking care of unfinished business left by the previous Administration and Congress. Unfortunately, much remains to be done. Copyright piracy remains a significant barrier to legitimate trade in copyright materials in the Philippines, causing losses to all the industries. Piracy phenomena abound, including growing P2P and other Internet-based piracy (and increasing mobile piracy), software end-user piracy in businesses, illegal camcording of movies in theaters, book and journal piracy, retail shop and mall piracy, Pay TV theft, and some remaining pirate optical disc production being imported or exported. To combat these problems, industry endeavors to work with the Philippine Anti-Piracy Team (PAPT).<sup>1</sup> The agencies under PAPT provided some support for anti-piracy activities again in 2010, including raids on retail piracy and companies engaged in end-user piracy of business software. The authorities have not, however, 1) prosecuted any cases involving illegal camcording of movies under the new statute despite requests and interdictions by cinema security staff, 2) taken steps to significantly reduce Internet-based infringements (under the leadership of any Philippine agency), 3) run surprise and transparent inspections on all optical disc plants and CD-R burning operations in cooperation with industry despite repeated requests, 4) taken significant actions against book or photocopy piracy on or off university campuses, or 5) shut down some of the estimated 800 pirate cable systems, revoking their licenses or permits. The Philippine Government needs to make more effective its anti-piracy activities to reduce piracy levels in the country.

#### Priority Actions Requested in 2011:

##### Enforcement

- Implement Anti-Camcording Act of 2010 with first cases brought against illegal camcording in the Philippines.
- 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.
- Re-establish specialized IP courts and have Supreme Court issue Special IP Court Rules to increase speeds of dockets and enable more cases, including criminal cases, to move forward in the system.
- Issue implementing rules for the penal provisions of R.A. 8792 (Electronic Commerce Act), particularly on piracy.
- Provide adequate funding for OMB, and have OMB run verification visits and ensure their transparency by permitting the presence of stakeholders in plant visits and other operations.
- Clarify the jurisdiction and powers of the National Telecommunications Commission (NTC) and the Commission on Information and Communication Technology (CICT) to enable them to take enforcement actions against online infringements, and create a streamlined procedure to allow complaints to be filed to NTC and CICT.

##### Legislation

- Pass as a matter of first priority amendments to the IP Code to fully implement the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) and make other important changes.

---

<sup>1</sup> Specifically, IIPA members work with the new leadership of the Philippine National Police (PNP), the National Bureau of Investigations (NBI) (and its Intellectual Property Rights Department (IPRD)), and the Optical Media Board (OMB) (which continues to run raids on an *ex officio* basis but remains inadequately funded).



- Enact and implement legislation to facilitate removal of infringing material or services from the Internet through an effective notice and takedown system, establishing ISP responsibility and fostering ISP cooperation.
- Adopt landlord liability in the law.<sup>2</sup>
- Permit voluntary music collective management organizations (CMOs) to commercially operate without interference from the government.

## PIRACY AND ENFORCEMENT UPDATES IN THE PHILIPPINES

Lack of Effective Court Remedy Against Copyright Infringement: Since 2002, there have only been five criminal convictions under the Copyright Act (and three under the Optical Disc Act).<sup>3</sup> To our knowledge there were no criminal convictions in 2010 for copyright piracy. The largest criminal fine ever imposed in the Philippines for copyright piracy was a modest P200,000 (approximately US\$4,550), and in only two known cases did the penalty include imprisonment (in each case, one year, although the defendant in one case absconded and remains at large). Problems begin with the criminal inquest procedure at the Department of Justice and do not cease through the criminal trial. 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 to conclude. During the extended trial period, many problems arise, including: 1) the transfer of prosecutors and judges, 2) the use of delay tactics by defendants' counsel challenging search warrants or seeking further delays due to technicalities, and 3) 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 warrant quashals further discourage right holders from bringing civil cases.

Establishment of Special IP Courts: One major step to improve the situation involved the long-promised establishment of specialized IP courts in the Philippines, including criminal trial courts. In 2009, the government held a public hearing for stakeholders and discussed the creation of two or three pilot IP courts with national jurisdiction. Subsequent to that hearing, the IP Office of the Philippines presented proposed rules to the Chief Justice of the Philippine Supreme Court.<sup>4</sup> We are unaware whether the Chief Justice of the Supreme Court has presented the rules

<sup>2</sup> Former President Macapagal-Arroyo, in a 2006 letter memorandum, 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."

<sup>3</sup>

THE PHILIPPINES: CRIMINAL COPYRIGHT CASES RESULTING IN CONVICTION 2002-2010	
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, 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)

<sup>4</sup> See Editha R. Hechanova, *Special IP Litigation Rules Proposed*, Managing Intellectual Property, December 1, 2010, at <http://www.managingip.com/Article/2365764/Special-IP-litigation-rules-proposed.html?Print=true>.

to the Court *en banc* at this stage. Issuance of those draft rules would be welcome as they would: 1) establish special IP courts with national jurisdiction, in Quezon City, Manila, Makati, Mandaluyong and Pasig, 2) prohibit certain pleadings to avoid delays, 3) provide that judgment can be rendered without trial (on the basis of the position papers, affidavits, documentary and real evidence submitted by the parties), unless absolutely necessary to determine specific factual matters, 4) ensure that any trial or hearing is completed within 60 days, 5) result in judgment within 30 days of receipt of the last memoranda, 6) shorten the period to file pleadings and issue orders, and 7) provide for destruction or impoundment of infringing items, devices, documents, packaging and other materials used to commit the infringing act (allowing for samples and photographs to be preserved and admissible as evidence).

Effective Search Warrant Procedure in Copyright Cases Needed to Avoid Unjustifiable Quashals: One of the most problematic aspects of the Philippine court system remains the *de facto* unavailability of search warrants in copyright cases due to unwarranted constitutional challenges by defendants' counsel. Search warrants (including multiple warrants needed to conduct a thorough search of rows of retail stores selling pirated discs), raids, and follow up prosecutions should be obtainable on a transparent, reasonable and timely basis, and warrants should not be quashed without full transparency. The "New Fields,"<sup>5</sup> "Tyger828," "X-Habit"<sup>6</sup> and "Global Team Space"<sup>7</sup> cases exemplify the result of not having dedicated IP courts with expert jurists in the Philippines, and are just the latest examples in a litany of cases in which search warrants for blatant piracy have been quashed and/or pirate goods or materials or implements used in piracy have been returned to defendants.

The 2008 *Powermac Centre Company* case is instructive. The case involved the unauthorized pre-loading of mp3 music files onto iPods by Powermac's retail stores. 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, in which a warrant issued by a police officer personally witnessing acts of infringement was nonetheless quashed.<sup>8</sup> This line of cases, starting with *Solid Laguna*, is inconsistent with the Supreme Court's decision in the *Columbia* case,<sup>9</sup> 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. The unavailability of a search warrant remedy calls into question the Philippines' compliance with its TRIPS requirements.

Camcording Piracy: The Philippines has become a regional hotspot for illegal camcording of movies at cinemas. There were 20 (19 video and one audio) instances of illegal camcording forensically matched to the Philippines in 2010, despite 22 known interdictions by cinema security staff following the enactment of the new law.<sup>10</sup>

---

<sup>5</sup> On May 20, 2010, the PNP was able to secure search warrants, served on May 24, 2010, resulting in the confiscation of 83 computers loaded with unauthorized and unlicensed software, including 17 counterfeit CD installers of various software titles. The defendant petitioned to quash the warrant, and on July 8, 2010, local BSA counsel received a copy of the Order of the trial court dated June 29, 2010 in which the court directed the "immediate" return of the seized items to the defendant, and despite motions filed to stay the execution of that order, the local sheriff returned the 83 computers to the defendant the same day.

<sup>6</sup> On April 5, 2010, NBI served search warrants on two sister companies, Tyger828 Phils., Inc. and The X-Habit, Inc. for alleged unlicensed use of software, resulting in the confiscation of 26 computers loaded with unauthorized and unlicensed software. The defendants filed a Motion to Quash the search warrants. Without hearing, on August 27, 2010, local counsel was informed by the NBI that the Motion to Quash was granted (by the New Fields judge), although they were not notified by the court until September 1, 2010, citing "lack of board authorizations" authorizing the search warrants. The case is ongoing with a Motion for Reconsideration of the quashals that, to date, has not yet been resolved by the court.

<sup>7</sup> On November 5, 2009, the NBI served search warrants on Global Team Space in which a total of fifty (50) computers loaded with unauthorized and unlicensed software programs. Following the tactic employed in the New Fields, Tyger 828, and X-Habit cases, Global Team Space filed a Motion to Quash before the same court which quashed the search warrants in the previous cases. On October 27, 2010, the same court granted the motion to quash and ordered the return of all seized items, which again was immediately carried out by the Sheriff, despite the timely filing of a Motion for Reconsideration.

<sup>8</sup> *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>. The *Telmarc* case came on the heels of another search warrant quashal in the *Solid Laguna* decision, *Sony Music Entertainment (Phils), et al v. Hon. Judge Dolores Español et al*, G.R. No 156804, March 14, 2005. *aff'd* 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.

<sup>9</sup> 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).

<sup>10</sup> Camcording is particularly damaging in the Philippines because it can fuel rampant online piracy, negatively impacting worldwide distribution, and can if left unchecked prevent the establishment of legitimate online distribution platforms. Philippine movie pirates engaging in this activity typically choose films that release earlier than, or day-and-date with, the U.S., and notably, a day-and-date release in the Philippines is still more than half a day earlier than a U.S. release,

Anecdotally, local films seem to receive a longer piracy-free window than foreign films (generally two weeks following their theatrical release). Foreign films are illegally camcorderd on or closer to the initial date of theatrical release. Infringing copies of U.S. motion pictures forensically linked to illegal copies made by camcorders in Philippine cinemas are being distributed globally. Pirate versions sourced from illegal camcording are often available the day of 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 U.S. Camcorder piracy in the Philippines has also had a profound negative effect on the local movie theater business in the Philippines. Republic Act No. 100088 was signed into law by former President Macapagal-Arroyo on May 13, 2010,<sup>11</sup> and while the PNP, the NBI and the OMB were named in August 2010 as the key enforcement agencies to head implementation of the law, and PNP officers have attended some industry training, they have still neither visited cinemas nor met with exhibitors to ensure that notices of the new law are being displayed. Industry, after consulting with the new Director General of the IP Philippines, has referred to his office and NBI one criminal syndicate having expanded operations outside of Manila, and investigations remain ongoing.

**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 2010, thereby stunting the growth of the information technology sector. Preliminary estimates indicate the commercial value of unlicensed business software in the Philippines in 2010 was US\$131 million, while business software piracy levels were 68%, above the regional average.<sup>12</sup> A September 2010 study by IDC and the BSA shows that reducing the piracy level by 10 percentage points in the Philippines will lead to job creation in the thousands, the generation of millions in tax revenues and hundreds of millions to the country's GDP.<sup>13</sup>

The business software industry continued to receive good cooperation from PAPT in 2010. In addition, the OMB made visits (*ex officio*) to companies suspected of using unlicensed Business Software Alliance member software. As a result of ongoing cooperation, eight end-user piracy raids were conducted in 2010, with four raids resulting in criminal complaints with the Department of Justice. BSA also reports that, while prosecutors are still not assigned specifically to handle IP cases, the IPO Philippines has initiated a program in 2010 by which prosecutors from the DOJ will be detailed to assist right after enforcement actions are conducted by the PNP. Unfortunately, the New Fields, Tiger828, X-Habit, and Global Team Space cases discussed above resulting in quashals of search warrants are considered low points for the Philippines in terms of software protection over the past several years.

**Internet Piracy:** Internet piracy has worsened in the country and should be dealt with as a high priority by the Philippine Government.<sup>14</sup> Internet usage in the Philippines continued to grow in 2010, with broadband well surpassing the two million subscriber threshold between the two main competitors, Globe and Smart.<sup>15</sup> The overall

---

meaning they are decimating the market not only in the Philippines but around the world. Philippine-traced camcords of *Inception* and *The Losers* were available the same day as their U.S. release. Philippine-traced camcords of *Alice in Wonderland* and *Iron Man 2* were available prior to their U.S. release dates.

<sup>11</sup> See Kaye Villagomez, *Anti-Camcording Bill Passes*, August 14, 2010, at <http://mb.com.ph/articles/272248/anticamcording-law-passed>.

<sup>12</sup> BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in the Philippines. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2011 Special 301 submission at <http://www.iipa.com/pdf/2011spec301methodology.pdf>. BSA's final piracy figures will be released in mid-May, and the updated US software publishers' share of commercial value of pirated software will be available at <http://www.iipa.com>.

<sup>13</sup> See IDC and BSA, *The Economic Benefits of Reducing Software Piracy A Report by IDC*, September 2010, at <http://portal.bsa.org/piracyimpact2010/studies/piracyimpactstudy2010.pdf>, which demonstrated that a reduction in end-user software piracy over four years (2010-2013) of ten percent (from 69 to 59 percent) would result in \$329 million in additional revenue to the GDP, \$30 million in tax revenues, and 1,097 new jobs. A reduction of ten percent in just two years would multiply the positive effects.

<sup>14</sup> Internet piracy greatly limits the establishment of legitimate online distribution platforms and services for consumers, harming consumers and right holders alike. Revenue from these platforms and services are critical to financing the development of new creative works. For example, for independent motion picture producers who license content country-by-country, online piracy exports troubled marketplaces and high piracy rates to other markets instantly. The independent production sector is limited in its ability to shift to technology-enabled new business practices that might limit piracy, for example, independents cannot engage in worldwide same day "day-and-date" releases (which may prove an effective method to curb or delay piracy for the major studios) due to the fact that national distributors release on their own schedule.

<sup>15</sup> See *Globe Broadband Subscribers Surpass 1-M*, ABS CBN News.com, November 2, 2010, at <http://www.abs-cbnnews.com/business/11/01/10/globe-broadband-subscribers-surpass-1-m-0>. Globe reported just over 1 million broadband subscribers while Smart had reported 1.3 million subscribers earlier in 2010.

Internet population as well as the mobile population are even more robust, at 29.7 million Internet users (according to Nielson), and more than 80 million mobile users in the Philippines, with increasing mobile broadband Internet (according to Point-Topic, mobile broadband has surpassed fixed line broadband).<sup>16</sup> With this growth in Internet usage has come increasing piracy which must be addressed. For example, steps should be taken against the many sites offering free downloads in exchange for “donations.” A proactive approach including takedowns and blocking of sites engaged in blatant and serious piracy activities should be employed, and action must be taken against commercial pirates who advertise hard goods or downloading onto devices.

Unfortunately, the legal framework and enforcement infrastructure to deal with Internet piracy in the Philippines has not caught 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 system (without relying on court-issued relief) in that law or in the current 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.

In the meantime, existing enforcement authorities are urged to launch a campaign aimed at stopping Internet infringements. The Commission on Information and Communications Technology (CICT) states among its declared policies the establishment of “a strong and effective regulatory system that fosters competition and protects intellectual property rights.” IIPA members welcome CICT’s involvement in combating Internet-based copyright infringements. However, it has become unclear over time who among the National Telecommunications Commission (NTC) and CICT has jurisdiction to enforce against online piracy.<sup>17</sup> Ultimately, NTC and/or CICT must be placed in a good position to take enforcement actions against infringing content in the online environment, and a streamlined procedure should be in place to allow copyright owners to file complaints with the appropriate authority in a more efficient manner. It is also critical that the appropriate government authority take a more active role, for example, through education campaigns to the public, about online copyright protection, and that NTC should help nurture an environment facilitating the development of legitimate electronic commerce for creative industries.

**Mobile Piracy, Including Hard-Disk Loading:** Increasingly, copyright holders are hit hard by the sale of infringing content onto various mobile and electronic devices sold or loaded in the malls and street markets. Vendors in the Philippines have dedicated booths and stalls within shopping malls (shopping areas such as Metrowalk, Makati Cinema Square, and Quiapo) and offer as a service the pre-loading or loading after the sale of content (or “download for a fee”) onto mobile phones, mp3 devices, flash drives, recordable optical discs, and even computer hard drives. The pirate content includes music, videos, software, and published materials, especially medical and nursing titles and trade books. Mobile phone penetration is well above 80% penetration with more than 80 million subscribers. While broadband mobile services remain in their relative infancy, there are increasing reports of infringing wireless application providers (WAP) which provide pirate content directly through wireless communications onto mobile phones/devices. 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 NTC and/or the CICT to act aggressively against piracy and other copyright issues conducted over mobile networks. We also recommend enhancing anti-piracy enforcement work carried out by OMB by including mobile device piracy within its purview.

**Book and Journal Piracy:** Illegal commercial-scale photocopying and the scanning of entire books into digital copies are the predominant piracy problems facing the publishing industry in the Philippines. Online piracy, particularly of medical textbooks, professional books, and trade books, is increasing but is not yet a significant threat.

---

<sup>16</sup> *The Philippines Broadband Overview*, Point-Topic, November 22, 2010, at <http://point-topic.com/content/operatorSource/profiles2/philippines-broadband-overview.htm>.

<sup>17</sup> Although NTC is under the CICT, CICT has reportedly claimed that NTC and not it has jurisdiction. NTC meanwhile denies that it has any power over illegal Internet transmissions (and complaints filed with NTC are being referred back to the IP Philippines, causing further delays and deflections of blame between agencies). The IP Philippines has apparently tried to get the NTC to commit to talking to communication companies and their ISP companies about remedies to minimize piracy, but so far, no result has come from such dialogue.

Photocopy shops continue to operate with impunity on and around college, medical, and nursing school campuses due to a lack of action by law enforcement authorities. Pursuing an enforcement action remains difficult given the burdensome hurdles right holders face (including the *de facto* unavailability of search warrants). 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 unauthorized photocopying and through downloads of unauthorized digital (scanned) 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 notorious for illegal photocopying activities occurring at the many copy shops littering the area. Copyshops also operate in and around hospitals, and near government regulatory agencies. 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. Vendors of pirated books also sell the infringing copies of books door-to-door at doctors’ offices, medical establishments, and trade fairs. 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.

**Retail and Mall Piracy:** While legitimate music sales are slightly up in 2010, chiefly due to better marketing by local distribution channels,<sup>18</sup> 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. In addition to Quiapo, mobile device piracy occurs frequently in booths and stalls within many shopping malls such as Metrowalk, Makati Cinema Square, and Greenhills. Even mainstream malls not known for piracy, such as the SM and Ayala malls are host to downloading stations disguised as repair shops. The sale of cheap pirate and counterfeit optical media (P35 to P100 per disc, or US\$0.80 to \$2.35), whether imported or produced domestically in factories or, more often, burned onto recordable discs, 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. Pirate DVDs also remain at piracy hotspots like Virra Mall, Greenhills Shopping Center in San Juan, and Circle C Mall in Project 8, Quezon City, 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 being an exception to this), IIPA has little information except what has been provided previously by the government,<sup>19</sup> but such government statistics are of little value, since they 1) cover only physical piracy; 2) are cursory and do not answer questions about the true value of the seizures; 3) do not break down seizures by category into piracy (versus counterfeiting); 4) do not indicate the total size and scope of the piracy in the market where the seizure took place; and 5) do not indicate the source of seizure (i.e., small distributor versus source piracy operation). Further, the lack of reporting resulting from seizures makes it impossible to conclude whether these actions have any deterrent effect on piracy (e.g., whether those engaged in piracy ceased their activities).

The Optical Media Board (OMB) continues to provide support and expresses commitment to anti-piracy efforts, but in order for outreach and inspections to take place, IIPA continues to call upon OMB to be properly funded. The Philippine Congress has never taken the important step of properly funding the OMB, but should now do

---

<sup>18</sup> For example, the local music industry reports that legitimate sales of music are up due to more focused marketing of compilations in stores and the launching of TV-based new artists who participate in well-publicized music competitions.

<sup>19</sup> The latest statistics by the IPO Philippines indicated that between January 1 to November 30, 2010, NBI, PNP, OMB, Board of Customs (BOC), and the Food and Drug Administration (FDA) seized slightly over 4.6 million pieces, with an estimated value of 4.36 billion pesos (US\$99.5 million). There is no breakout of product by category. OMB had seizure of the greatest number of pieces, while PNP reported the greatest value of seizures, followed by BOC and then OMB, but the valuation methods and the breakout of products seized is not provided. See IPO Philippines, Summary of IP Enforcement Data, 01 January - 31 [sic] November 2010, at [http://www.ipophil.gov.ph/document/c9a3ab7b\\_Slat2010.pdf](http://www.ipophil.gov.ph/document/c9a3ab7b_Slat2010.pdf).

so to provide the new Chairman with the tools for effective enforcement.<sup>20</sup> OMB should also improve its Licensing Department's function, which is reportedly slowing the release of some members' legitimate products into the market, while illegal products which do not go through licensing come into the country freely. There is also reportedly a lack of transparency in the disposition of cases subsequent to raids which should be remedied.<sup>21</sup>

**Mechanical License Piracy (Karaoke):** Karaoke is 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 many that have not. Exacerbating the problem are a few manufacturing companies which incorporate USB ports onto their karaoke machines which allow the manufacturers or the owners of the machines to add unauthorized copies of tracks, including unauthorized tracks from the manufacturer's websites. A letter has been sent to OMB Chair requesting action against unauthorized Karaoke device distributors. A few Karaoke device distributors have positively responded when demand was made by right holders for the proper payment of royalties. A majority of the device distributors have ignored repeated notices from right holders. These unlicensed devices are sold openly in different market centers all over Metro Manila and the provinces.

**Pay TV (Cable and Satellite) Piracy:** 2010 showed no improvement in the Philippine Government's response to cable piracy. Cable operators continue to steal mostly U.S.-owned broadcast signals and resell them to subscribers without compensation to the right holders. The National Telecommunications Commission continues to renew the licenses of companies engaged in signal theft and no pirate cable company has been sanctioned by the courts or government. No relief to this unending theft is available under current law or through the court system. Under-declaration by legitimate providers also continues to cause losses to content owners, as does individual illegal connections to Pay TV signals. Pay TV theft in the Philippines continues to cost U.S. content owners significant revenues.<sup>22</sup>

**Government Use of Software:** Executive Order No. 262, 2000 entitled "Providing Policies, Guidelines, Rules and Regulations for the Procurement of Goods/Supplies by the National Government" prohibits government from purchasing illegal software and allows only suppliers of legitimate software to participate in government bidding. This EO has yet to be fully implemented, and the government is encouraged to fully enforce the EO and avoid contrary proposals which would restrict or create preferences as to technology choices by government agencies.<sup>23</sup>

**Additional Enforcement Hurdles in the Philippines:** Right holders in the Philippines face the following additional hurdles to enforcement of their rights:

- Right holder inquests and preliminary investigations by the Department of Justice are often delayed by purely bureaucratic signing procedures, as the Chief Prosecutor apparently must sign off on every resolution issued by all prosecutors.

---

<sup>20</sup> For example, the OMB's total budget for 2008 was P27 million (then 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 (then 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 then 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.

<sup>21</sup> For example, the local record industry reports two raids, one on May 17, 2010 of a warehouse in the Quiapo area reportedly leading to the seizure of around 300 boxes of pirated discs, and one on August 17, 2010, in which a large scale sweep of retail pirate shops selling pirate CDs and DVDs occurred in Quiapo. Despite the news coverage of these raids, results in these cases are unavailable.

<sup>22</sup> The Pay TV association overseeing the Asia market, the Cable and Satellite Broadcasting Association of Asia (CASBAA) estimated that revenue losses to the Pay TV industry increased to US\$90.3 million in 2010, up from just over US\$82 million in 2009, with most of the increased losses accruing due to increased under-declaration by Pay TV operators.

<sup>23</sup> We note here legislation introduced from time-to-time which would restrict technology choice. Such approaches should be rejected in favor of technology neutrality when it comes to software usage.

- 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.
- With certain exceptions (end-user raids being one), copyright owners are not permitted or invited to participate in investigations.<sup>24</sup>

## COPYRIGHT LAW AND RELATED ISSUES

Copyright protection is governed under Republic Act 8293, the Intellectual Property Code (IPC) of the Philippines (in force January 1, 1998). Since the time of the Code, various copyright revision drafts have been introduced into each Congress over the years, with the intent to fully modernize the law, fix some deficiencies, and fully implement the WCT and WPPT to which the Philippines acceded in 2002. IIPA supports Senate Bill 2628 introduced by Senator Loren Legarda on December 14, 2010. The latest “substitute” House Bill 3841 contains some but not all of the strong elements in S.B. 2628, and includes some additional problems that do not exist under the current law.<sup>25</sup> Among IIPA’s chief concerns are:

- **Technological Protection Measures:** S.B. 2628 is superior to the alternative drafts in that it contains coverage of TPMs in line with the WCT and WPPT, defining them (in draft Section 171.12) to include both measures used to restrict unauthorized access as well as the exercise of exclusive rights. By contrast, the substitute H.B. has no express coverage of “access control” TPMs.<sup>26</sup> In addition, the substitute H.B. (in draft Section 216.1(b)(i)) contains no prohibition on trafficking in or providing services related to circumvention devices, technologies, or tools, prohibiting only the act of circumvention expressly.<sup>27</sup> Finally, the substitute H.B. deems the circumvention of TPMs merely as an aggravating circumstance, but a corresponding Senate version (S.B. 2487) criminalizes the circumvention of TPMs. Thus the corresponding Senate version is preferable on this point (but still is worse than S.B. 2628 since it lacks a prohibition on trafficking).
- **Civil Damages:** S.B. 2628 is superior to the alternative drafts, as its civil damages provisions set forth the goal of awarding damages which the court “finds to be sufficient to fully compensate the right holder for the injury he has suffered, and sufficient to constitute a deterrent to further infringements.” The substitute H.B. contains no such language. The substitute H.B. retains statutory damages, but sets the minimum very low at US\$1,140 and it is unclear whether the recovery amount is per work or per infringement. In addition, it is unclear whether the statutory damages “in a sum equivalent to the filing fee of the infringement action” is meant as a cap. If so, this will undoubtedly be non-deterrent. IIPA is pleased that the Government of the Philippines is considering a statutory damages option, but it should create a workable remedy that can be usefully employed by right holders in practice.
- **Duty to Account:** The substitute H.B. (in Section 180.5) introduces a new and very confusing provision requiring an “accounting” from an assignee or licensee to a “copyright owner” (which is used interchangeably with “author”). In many countries, a joint author may use a joint work without authorization of the other joint

---

<sup>24</sup> 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).

<sup>25</sup> The bill substitutes for H.B. 47, H.B. 267 and H.B. 2040. H.B. 267 was introduced into the 15<sup>th</sup> Congress by Representative Juan Edgardo Angara and primarily concerned broadcasters’ and performers’ rights, while H.B. 2040 was introduced by Congressman Irwin Tieng and provides exceptions for translations of printed materials into formats accessible to the visually impaired.

<sup>26</sup> It may be that the drafters intend the phrase “restrict acts ... which are not authorized ... or permitted by law” to include access controls, but the previous wording, “any technology, device or component that, in the normal course of its operation, controls access to a protected work,” is clearer and preferable.

<sup>27</sup> S.B. 2628 Article 229A.1(b) provided that any person who “manufactures, imports, exports, distributes, offers to the public, provides, or otherwise traffics in devices, products or components or offers to the public or provides services, which ... i) are promoted, advertised or marketed for the purpose of circumvention of any effective technological measure; or ii) have only a limited commercially significant purpose or use other than to circumvent any effective technological measure; or iii) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of any effective technological measure” is guilty of a crime and is assimilated to a copyright infringement subject to civil remedies.

author subject to an accounting, which may have been the intention of the drafters, but the insertion of a duty to account to all licenses or assignments is completely unwarranted and unduly interferes with the exercise of exclusive rights by right holders and impinges on their freely negotiated licenses and assignments. The Section should be removed from the substitute H.B.

- Exceptions: Several exceptions in the substitute H.B. must be examined and altered to ensure they meet the Berne Convention three-step test. For example, the substitute H.B. (Section 185) introduces a new exception to “reproduce” and “distribute” works “in a specialized format exclusively for the use of the blind, visually- and reading-impaired persons,” and the term “distribute” is noted to include distributions of “copies made abroad.” This should be confirmed to include only copies lawfully made and distributed. Another example is the broadening (in Section 188) of the exception for reprographic reproductions for libraries from a “single copy” to a “limited number of copies” of the work “as may be necessary for such institutions to fulfill their mandate.” It is unclear whether this broader exception, with the vague use of the phrase “necessary ... to fulfill their mandate” can pass muster under international treaties to which the Philippines is party. It should be noted that S.B. 2628 contains limiting language, e.g., in draft Section 188.2, the limitation is narrowed to a “single” reprographic copy and subject to the work being “not reasonably available to it through commercial channels.” The latter phrase is not included in the new draft bill. A third example is the “decompilation” exception. In S.B. 2628, the appropriately narrowing language allowing decompilation “to the extent that such decompilation is indispensable in order to obtain the information necessary to achieve such inter-operability” was changed to the much broader “to the extent that such decompilation is done for the purpose of obtaining the information necessary to achieve such inter-operability.” The narrower formulation should be reinstated.

Other areas in which S.B. 2628 is superior to the substitute H.B.:

- Exploitation Right in Audiovisual Works: S.B. 2628 ensures that the producer of an audiovisual work had the “exploitation” right in the work, not just the right in “exhibition” of the work. While it is usually the case that contractually, the producer will exploit the copyright, clear recognition of this in the statute simplifies the process by which rights licensed can be recognized in the Philippines and recognizes the longstanding commercial practice of the film industry.
- Notice Provision for Liability: S.B. 2628 (Section 216(b)) sets forth that liability attaches, e.g., if a person “benefits financially from the infringing activity of another person who commits an infringement if the person benefiting has the right and ability to control the activities of the other person,” whereas the substitute H.B. imposes liability if a person “benefits financially from the infringing activity of another person who commits an infringement if the person benefiting *has been given notice of the infringing activity* and has the right and ability to control the activities of the other person.” The additional language represents a major narrowing of the provision; if the intention is to add a knowledge requirement, we propose the language be changed to “has actual or constructive knowledge, or has been given notice of the infringing activity....”
- Importation Right: S.B. 2628 adds “importation” to the current distribution right since it remains a key component of many laws to provide the author with the ability to authorize imports and prevent unauthorized imports.
- Designation of Agent to Enforce Rights: S.B. 2628 adds “or a similar agent” to Section 183, to ensure that right holder representatives can act on their behalf in effectuating protection of their rights in the Philippines. The substitute H.B. Section 183 would not only fail to define the scope of who may enforce rights on behalf of copyright owners, but would introduce a new collective management regime. S.B. 2628 should be followed so that agents can act on behalf of right holders in enforcing their rights in the Philippines.

- **Term Extension:** One of the important changes to be made in the Philippines is the extension of term of protection, to life of the author plus 70 years, or 95 years from publication for works whose term is calculated from such event. Previous bills contained term extension, which would avoid Philippine works and objects of related rights falling into the public domain in other countries on a discriminatory basis, and would bring its law into line with the international trend. It is unfortunate that the substitute H.B. removed this important and positive change.
- **Rights Management Information Protection:** Rights management information provides the basis for online licensing and benefits both right holders and users by certifying the integrity and authenticity of digital works. The draft bill should introduce provisions to prohibit dissemination of copies in which rights management information has been removed or altered and this prohibition should apply to all types of copyright works.
- **Express Coverage of Import, Export, and "Using" an Article "in a Trade or Business" as a Crime:** One of the important achievements created in S.B. 2628 is the clear inclusion of "import," "export" and the "use of an article in a trade or business" without authorization as a crime. This language should be retained.

**Service Provider Issues:** While the new copyright law, when enacted, will spell out with specificity some important criteria for liability in general, the E-Commerce Law 2000 (Republic Act No. 8792) already deals with the specific issue of service provider liability. First, it states 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 for indirect infringement, i.e., knowingly receiving a financial benefit directly attributable to the unlawful or infringing activity. It then provides 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. The law should be amended to provide for a statutory notice and takedown system (e.g., in the absence of court ordered relief) and policies to effectively and fairly address repeat infringers. Under the current Law, 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." The Law could also be amended to foster cooperation in investigations into piracy in the non-hosted environment including effective and fair policies to deal effectively with cases of repeat infringers.

**Avoid Burdensome Restrictions on Collective Management of Music Rights, and Allow Collective Management Organizations to Operate Freely in a Commercial Manner:** Unfortunately, since May 2009, the IP Office of the Philippine Government has continued to take steps to impede free contractual relations between music companies and collective management organizations (CMOs) which collect public performance royalties on broadcasts or communications 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) as a result has 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.<sup>28</sup> Moreover, there should not be a mandatory process for tariff pre-approval which would disrupt royalty collection and prejudice right holders by requiring them to bear unnecessary costs associated with the rate-setting procedures and by denying them the ability to collect royalties that are set in free and open market conditions.

**Other Draft Legislation:** IIPA supports passage of 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 supports Senate Bill 684, An Act Requiring

---

<sup>28</sup> 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.

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 about reports of a Free Open Source Software bill which would require government offices to use open source software and 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.

**Unreasonable Taxes and Duties on Motion Picture Business:** Several taxes/duties imposed on film companies remain inordinately high. For example, U.S. companies are burdened with a 30% income tax on net profits, a 5% withholding tax on gross receipts chargeable to income tax liability, and a 10% tax on the distributor's share of the box office. Import duties are assessed at 15% of the invoice costs, plus freight and insurance, on all prints and trailers imported into the Philippines and related advertising materials are dutiable at a 10% amount. Finally, there is a 15% tax on royalty remittances (to producers) on profit remittances or dividends. These taxes make it impossible to compete with piracy, and very difficult to compete with local right holders who do not have to contend with all of these costs.

## TRAINING AND PUBLIC AWARENESS

IIPA members continued to provide and participate in various public awareness and training activities in the Philippines in 2010. The BSA sponsored capacity-building seminars for enforcement agencies in 2009 and 2010. BSA sponsored a capacity-building training seminar for PAPT enforcement agencies (National Bureau of Investigation (NBI), Philippine National Police (PNP) and Optical Media Board (OMB) on December 6, 2010 to prepare the PAPT agencies for the 2011 anti-piracy campaign. The program was aimed to provide the enforcement agents with a big picture on anti-piracy campaigns to emphasize their crucial role in the enforcement process and why the Philippines should honor their treaty obligations. In 2011, BSA will continue to provide programs for law-enforcement personnel regarding software copyright protection and software licensing. Also during 2010, the motion picture industry held eight training sessions on the implementation and enforcement of the Anti Camcording Act of 2010 were attended by a total of 259 theater personnel. MPA representatives also participated in an optical disc enforcement and forensic investigation training workshop coordinated by the USPTO in coordination with the Philippines IPO Philippines and the OMB in Manila on July 15, 2010.

## GENERALIZED SYSTEM OF PREFERENCES

While the GSP statute expired on December 31, 2010, should it be reauthorized, IIPA is considering recommending a review to determine whether the Philippines qualifies for benefits under the GSP program, under which more than US\$733.6 million of Philippine goods, or 10.8% of the Philippines' total imports to the U.S. in 2009, and under which US\$912.9 million of Philippine goods, or 13.0% of the Philippines total imports to the U.S. in 2010 enjoyed duty-free access to the U.S. market.