

THE PHILIPPINES

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA files this Special Mention report on the Philippines to denote positive progress in several key areas for protection of creative content warranting recognition, and to otherwise note remaining issues in the country that should be addressed in the coming year.¹

Executive Summary: IIPA members wish to laud the leadership of the Philippine government, Ricardo Blancaflor, Director General of the IP Office of the Philippines (IPO), and Optical Media Board (OMB) Chairman Ronnie Ricketts, for taking novel and effective approaches to dealing with piracy in the Philippines and further modernizing protection. In the past two years, the removal of piracy from Quiapo and markets located in areas like St. Francis Square (Mandaluyong) and Makati Cinema Square (Makati), the passage of the anti-camcording law, the issuance of Supreme Court Rules of Procedure for Intellectual Property Cases, the establishment of administrative enforcement functions of the IP Office (and the availability of injunctive relief), and an MOU between Philippine National Police (PNP) and OMB to remove red tape,² all evidence the will of the Philippine government to tackle piracy and create space for legitimate creative business to grow. IIPA hopes that the IP Office of the Philippines and the OMB, the Philippine Anti-Piracy Team (PAPT) including Philippine National Police (PNP) and National Bureau of Investigation (NBI), will work together in 2013 to deal more effectively with unlicensed software use by enterprises (enterprise end-user piracy), book piracy (textbook copying and pirate or counterfeit bestsellers), Internet piracy, and emerging challenges such as “media box” and mobile device piracy. We are also hopeful that the new Supreme Court rules will lead to more effective judicial enforcement including effective search warrants and deterrent criminal convictions.

PRIORITY ACTIONS REQUESTED IN 2013

Enforcement

- Finalize amendments to the IP Code (including a landlord liability provision) already passed by the House and Senate, addressing concerns raised in this filing through implementing rules.
- Implement the Rules of Procedure for Intellectual Property Cases (issued in November 2011) to provide for speedier and more effective civil and criminal pre-trial procedures and trials, and resolution of the warrant “quashal” issue.
- Ensure effective action against online and mobile device infringements, and enhance anti-piracy enforcement work carried out by OMB by including mobile device piracy and “media box” piracy within its purview.
- Increase the budget of the OMB so it can conduct, in conjunction with the PNP, nationwide enforcement efforts.
- Maintain enforcement efforts, including prosecutions where necessary, under the Anti-Camcording Act of 2010.
- Remedy enforcement bottlenecks, including inquests and preliminary investigations by prosecutors with the Department of Justice (DOJ), including by streamlining signing procedures.
- Ensure that both the Department of Education and the Commission on Higher Education take an active role to ensure the use of legitimate copyright materials at colleges and universities.

¹For more details on the Philippines’ Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2013SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years’ reports at <http://www.iipa.com/countryreports.html>.

²Under the MOU, the police will be allowed to enforce OMB’s mandate without direct orders from their superiors and jurisdictional issues will be eliminated among different police precincts.



Legislation

- Ensure that the Copyright Amendment Bill is finalized by the first quarter of 2013.
- Modernize the E-Commerce Act to facilitate removal of infringing material or services from the Internet through an effective notice and takedown system and measures to deal effectively with non-hosted infringements.
- Include CD-R burning, mobile device piracy, “media box” piracy, and border enforcement in OMB’s purview under the Optical Media Act.
- Implement Republic Act 9184 (An Act Providing for the Modernization and Regulation of the Procurement Activities of the Government and for Other Purposes), such that the government will not permit the purchasing of illegal software, and will allow only suppliers of legitimate software to participate in government bidding.
- Ensure that DOJ finalizes IP Manual for Prosecutors and Law Enforcement Agents by the first quarter of 2013.

Training

- The U.S. and the Philippines should effectuate a “judge swap” whereby a U.S. judge familiar with copyright cases would swap places with one of the Philippine judges for a period of time (e.g., one year) to have a direct consultancy approach to the workings of the new IP Commercial Courts.

PIRACY UPDATES IN THE PHILIPPINES

Enterprise End-User Piracy of Software, Hard Disk Loading, and Unauthorized Use of Software in Internet Cafés: The use of unlicensed software continued to cause significant revenue losses to the software industry in 2012, thereby stunting the growth of the information technology sector.³ The software piracy rate actually increased to 70% in 2011, well above the Asia average of 60% and significantly above the global piracy average of 42%. The value of unlicensed software in the Philippines grew to US\$338 million in that same year. A September 2010 study shows that reducing the piracy level by ten 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.⁴ Hard disk loading, the pre-installation of unlicensed software or other copyright materials on new PCs or other devices is still prevalent even among established computer stores and computer parts stalls. Use of unlicensed software in Internet cafés remains rampant. The Philippines government should conduct audits of all Internet cafés and remove business licenses of those found to allow the unauthorized use of content.

Unauthorized Use of Software by Government Agencies: It remains important that the Philippine government work to fully legalize government software usage and have procurement practices in place to pay for software. Republic Act 9184 must be implemented to ensure the government refrains from purchasing illegal software and allows only suppliers of legitimate software to participate in government bidding.

Piracy of Textbooks, Journals, Trade Books: Illegal commercial-scale photocopying of scientific, medical, technical books (STM), as well as textbooks (on or near college, medical, and nursing school campuses), and trade books/bestsellers remains the predominant problem in the Philippines. An additional problem is the unauthorized scanning of books and the sale of unauthorized compilations of educational and professional review materials burned on to CD-Rs (with 100-200 titles per disc). Online piracy (e.g., through BitTorrent sites) of medical textbooks,

³BSA | The Software Alliance’s 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in the Philippines was 70%, representing a commercial value of unlicensed software of US\$338 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

⁴See 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.

professional books, and trade books, is significant, and with growing broadband access likely to increase. 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. The “university belt” in Metro Manila (e.g., Recto University) is notorious for illegal photocopying activities occurring at the many copy shops in the area. Copy shops 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 books in their establishments and thereby complicating investigations and enforcement actions. Areas such as Morayta and Paredes Street in Manila are commonly known for photocopying entire books, educational and review materials for professional examinations, as well as selling pirated books and compilations burned onto optical discs (CD-ROMs, DVDs). The publishing industry saw meaningful cooperation with the OMB in 2012. The OMB, with the assistance of the publishing industry, ran two successful enforcement actions (in July and December 2012) against pirate book vendors in the Paredes Street market, seizing over 31 sacks of books and unauthorized compilations of textbooks and review materials (from several different publishers) on CDs, DVDs and CD-ROMs. The OMB’s actions have had a significant impact in raising awareness of book piracy among law enforcement personnel and in the market. The industry will continue to work with OMB and the IPO to address book piracy in the country.

Internet Piracy a Threat in the Making: Internet piracy remains an emerging issue in 2012, with Internet penetration nearing 30 million people, but with only 1.7 million fixed broadband connections in the country.⁵ Many in the Philippines still access the Internet at Internet cafés. Most Internet piracy experienced in the Philippines is through peer-to-peer (P2P) file sharing services, the BitTorrent file sharing protocol, deep linking sites, blog sites (featuring album cover photos with download links, usually made up of people using fake names and accounts), and one-click hosting sites (cyberlockers) whereby those engaged in piracy on those sites sell passwords to their stored infringing materials.⁶ In 2012, the Entertainment Software Association (ESA) reports that the Philippines ranked 16th in the world in terms of the number of connections by peers participating in the unauthorized file sharing of select ESA member titles on public P2P networks.⁷ Increasing numbers of sites offer sales of hard goods through the Internet. Peer Media Technologies reported that during 2011, users initiated over 12 million downloads/uploads of unauthorized copies of major U.S. movie titles via certain P2P protocols in the Philippines.⁸ *Kat.ph* (formerly kickasstorrents), a site with connections to the Philippines (including a mirror site there), employs or facilitates the use of the BitTorrent file sharing protocol to enable pirated content to be quickly located and downloaded, and in particular, allows for extremely fast downloads of the largest pirate files of all kinds of copyright content, including music, movies, software, games, and published materials. This site, reportedly now based in Canada, is notable for its commercial look and feel. The site’s popularity has increased since 2011 and is now ranked by Alexa.com among the top 135 most visited sites in the world, and within the top 40 sites visited in the Philippines, Pakistan and Sri

⁵International Telecommunication Union, Fixed Broadband Subscriptions 2000-2011, at <http://www.itu.int/ITU-D/ict/statistics/material/excel/Fixed%20broadband%202000-2011.xls>, accessed on January 10, 2013.

⁶We note here that 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. High piracy rates impede or destroy legitimate distribution channels, including the emergence of legitimate online distribution platforms, because it is impossible to compete with free. This significantly reduces licensing fees, which are often relied on to finance future productions. 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.

⁷ESA’s reporting on P2P activity does not take into account downloads of these titles that occur directly from hosted content, such as games found on “cyberlockers” or “one-click” hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

⁸A major U.S. movie is defined as a movie released in 1,000 or more theaters in the U.S. These estimates reflect only a subset of movie-related piracy activity occurring during the monitoring period, as they account for only initiated downloads or uploads of major U.S. films through the listed P2P protocols. They do not include 1) downloads/uploads of unauthorized copies of movies that are not major U.S. releases, including local titles, through these P2P protocols; 2) downloads/uploads of unauthorized copies of any movies via other P2P protocols or through non-P2P technologies (e.g. websites); or 3) streaming of unauthorized copies of any movies via any technologies. Also, since local language title versions for scanning are not always available from established sources, and access to foreign language BitTorrent sites may fluctuate, results in certain countries are likely underrepresented.

Lanka. *Kat.ph* was cited by IIPA in its filing seeking to identify “notorious markets” for piracy,⁹ and on December 13, 2012, the U.S. Trade Representative listed *Kat.ph* as a notorious market.¹⁰

Mobile Device Piracy and Some Hard Disk or “Media Box” Piracy Detected: With mobile penetration exceeding 83 million by the end of 2011 according to the International Telecommunications Union,¹¹ there are increasing reports of infringing wireless application protocol (WAP) which provide pirate content directly through wireless communications onto mobile phones/devices. These underground businesses feature vendors often masking as “repair” shops, stalls or kiosks, offering at the point of sale or as an after service the downloading onto a device (including cell phones, mp3 players, hard disks, thumb/flash/USB drives) music, ring tones, games, software, and published materials, especially medical and nursing titles and trade books. These shops severely harm copyright industries, especially in an era when physical legitimate sales have dropped precipitously, and legitimate digital sales have not yet caught up.¹² We also have reports that third party gray market hard disk vendors are offering content (movies and music) to be copied on request or on demand onto the hard disks upon purchase or selling “media boxes.”

Street and Mall Piracy Abating, Especially in Metro Manila: The closure of the market (and distribution hub) in the Quiapo district of Metro Manila rippled throughout the community in 2011, and IIPA acknowledges the activity of OMB in weeding out piracy in markets located in areas like St. Francis Square and Makati Cinema Square in 2012.¹³ Reportedly, Metrowalk will soon be shut down as well. Notwithstanding these positive recent developments in Metro Manila, physical piracy in the Philippines requires continued vigilance, evident in Cebu (in the Visayas group of Islands), Davao (in Mindanao), and Baguio (in Luzon). Hard goods piracy consists of pirated CDs, DVDs, CD-Rs, CD-ROMs, and DVD-Rs, with a mix of imports from China and an increasingly significant percentage of CD-R and DVD-R burning. Sustained raiding has led many who had permanent kiosks and stalls to close their permanent stalls and instead sell on foot, with bags or backpacks containing pirated DVDs/CDs inside, near commercial establishments open 24 hours a day, or set up makeshift tables that can be folded down easily in the event of raids. Also evident are “glass door” pirates, who hide behind mirrored glass doors for customers, or use curtains, false doors, or walls. They open at different times during the day or night to evade authorities. These stalls are not very popular as some people are scared to go inside. With the closure of most hard goods piracy in Metro Manila, there is a concern that Baclaran (a district of Paranaque City, a city located south of Metro Manila) could become a major piracy hub if not controlled. At this stage, the OMB is strictly monitoring the area.

Remix Piracy: The music industry has experienced a new form of “remix CD piracy” in 2012 in which vendors outside a popular grocery chain set up a “DJ booth,” which provides entertainment in the form of loud party music attracting shoppers to come to the store. In exchange, they sell illegally manufactured “remix CDs” on the side, in which they take top hits and re-work them into compilations. They do so without any permit to commercially replicate or without any authority of the OMB. With the help of the OMB the industry has organized raids of the vendors and have sent complaint letters to the main office of the grocery chain. Although the enforcement operations were initially successful, particularly in the physical markets, online sales of remixes apparently continue. The industry will continue monitoring this “remix” underground market since they are still presumed to be operating under the radar.

⁹See International Intellectual Property Alliance (IIPA), *Submission Re: IIPA Written Submission Re: 2012 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 77 Fed. Reg. 48583 (August 14, 2012), Docket No. USTR-2011-0011, September 14, 2012, at http://www.iipa.com/pdf/2012_Sep14_Notorious_Markets.pdf.

¹⁰See United States Trade Representative, *Out-of-Cycle Review of Notorious Markets*, December 13, 2012, at <http://www.ustr.gov/sites/default/files/121312%20Notorious%20Markets%20List.pdf>.

¹¹International Telecommunications Union, *Mobile-Cellular Telephone Subscriptions Per 100 Inhabitants*, accessed January 24, 2013, at <http://www.itu.int/ITU-D/ict/statistics/>.

¹²The music industry group PARI reports that while the legitimate online market is growing in the Philippines, overall, the market is still contracting. Whereas in 2005, the market was sized at well more than 1.3 billion Pesos, with most of that revenue deriving from physical sales, in 2011, the market did not even reach 800 million Pesos, notwithstanding that the digital/online market now makes up more than 25% of the total market, and this year several legitimate online services opened, including Mymusicstore.com.ph, opm2go.com, and iTunes Philippines.

¹³The Quiapo market was cited for a couple of years by IIPA in its filings on “notorious markets,” and recognized in turn by the U.S. Trade Representative.

Piratical imports: There remain some reports from OMB that pirated optical discs are being smuggled from China through airports and seaports into the Philippines. The Bureau of Customs (BOC) under Commissioner Rufino Biazon is trying its best to monitor shipments containing pirated optical media. The Bureau is coordinating with the OMB regularly to control smuggling of the pirated goods into the country.

Karaoke Music Licensing Issue: Karaoke is popular in the Philippines, and various machine brands are sold in Raon, Quiapo with accompanying DVDs 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. Additional problems include the emergence of flash disks, memory cards, and hard drives. IIPA thanks the OMB for coordinating discussions on proper licensing for these uses of music, and understands that negotiations are ongoing with chief outliers.

Pay-TV (Cable and Satellite) Piracy: Signal theft in the Philippines continues to cost right holders in filmed and television content significant revenues with pirates stealing entire program streams and reselling them to subscribers without compensation to the right holder.¹⁴ Under-declaration by legitimate providers also continues to cause losses to content owners, as does individual illegal connections to pay-TV signals. To deal especially with the latter problem, IIPA is very pleased that House Bill No. 709, "The Anti-Cable Television and Cable Internet Pilferage Act of 2012," passed third reading on March 5, 2012, and that Senate Bill No. 3345 by the same name passed on January 28, 2013.¹⁵ The House adopted the counterpart Senate Bill with amendment on January 30, 2013, and the law now reportedly awaits signature. The Bills would make it illegal and subject to criminal penalties in the Philippines to engage in illegal tapping of any signal offered over cable television (CATV) or "cable Internet system" or the malicious destruction or removal of authorized CATV or cable Internet facilities. The bill also prohibits recording, reproducing, distributing, importing or selling of any intercepted or received CATV system/network signals for commercial purposes without the authority of the concerned CATV or cable Internet service provider. In 2006, IPO and the National Telecommunications Commission forged a Memorandum of Agreement to resolve disputes involving illegal pay-TV services and connections.¹⁶ This MOA has led to one administrative case against a cable company, but resulted in an out-of-court settlement, and in the end, the costs of bringing the action far exceeded the settlement amount.

ENFORCEMENT UPDATE IN THE PHILIPPINES

Enterprise End-User Software Piracy Enforcement Ceases, and Solution to the Search Warrant Quashal Problem Is Needed: BSA remains dissatisfied overall with the handling of its enterprise end-user piracy problem, and the results are indicative as the software piracy rate actually went up to 70% in 2011. In 2012, there were no end-user raids brought by BSA, a testament to the lack of confidence in the legal and judicial system arising from bitter experiences in 2010 and 2011.¹⁷ BSA-initiated raids suffer from delays in getting authorities (both NBI and PNP) to grant written authority for their officers to act in a timely manner, even after preliminary investigations were

¹⁴Specifically, the NTC has been known to renew licenses of companies engaged in signal theft. In 2011, IIPA understands that NTC began contacting cable companies when content providers issued cease-and-desist letters to cable operators transmitting unauthorized channel streams. This is a useful step and should lead to revocations of licenses in order to be truly effective.

¹⁵Senate of the Philippines, *Senate Passes Bill Prohibiting and Penalizing Cable Television and Internet Tappers*, January 28, 2013, at http://senate.gov.ph/press_release/2013/0128_prib3.asp.

¹⁶Bernie Cahiles-Magkilat, *IPO, NTC Ink Agreement on Resolution of Broadcast Cases*, mb.com.ph, June 17, 2006, at <http://www.mb.com.ph/node/79641>.

¹⁷While the OMB conducted *ex officio* corporate inspection visits on more than 200 establishments in 2009 unfortunately, in several cases, criminal search warrants were quashed, so the number of raids against end-user piracy targets went down precipitously, to eight raids in 2010, and only two raids in 2011. Historically in the Philippines, all cases have required settlement based on evidence obtained in a raid on the target. This is so because taking a case through the court system to judgment in the Philippines would not only take years, but the expectation is that the judgment would be appealed for years, resulting in BSA incurring enforcement costs that would far exceed the likely amount of damages awarded against the target. There has also been a steady increase in arguably frivolous claims filed against BSA after raid action has been taken against targets (and then, in several cases, after a warrant was quashed, the right holders were left defending a lawsuit when they should have easily prevailed in open-and-shut piracy cases).

conducted through private sector assistance. Inquest procedures with DOJ prosecutors remain difficult, with burdensome requirements to file charges in court. The high standard of “personal knowledge” for issuance of a search warrant remains a huge challenge for investigators and law enforcement authorities investigating end-user piracy cases.

Dealing With Book Piracy Requires Government Will: To address the significant book piracy issues, the Department of Education and, in particular the Commission on Higher Education, should take a more active role in developing the adoption of appropriate use and copyright policies among universities, encouraging the use of legitimate or original reading materials at colleges and universities, and ensuring that institutions of higher learning adopt and implement such policies. There have been earlier efforts to adopt appropriate use guidelines but these were entirely voluntary, with no monitoring or reporting requirements associated with the implementation of such policies. Thus, to date, there has not been broad adoption of appropriate use policies to ensure that students are not engaging in infringing behavior, and that on-campus vendors (such as copy shops) are not providing unauthorized copy- or print-on-demand services. While the industry has been able to obtain some raids against notorious pirate operations, the court system has stymied efforts to carry these cases through to justice due to the inordinate delays and costs. The *Multilinks/Marquez* case¹⁸ remains pending, now some seven years after the initial action. While currently raids are obtained through complaints filed with PNP or NBI, it is hoped the passage of the Copyright Bill will permit IPO Philippines to play a more active and coordinating role. Even in the case of successful raids, pirates generally resume operations after posting bail as the delays remain endemic in the system.

Addressing Internet and Mobile Device Piracy Before They Cause Significant Damage: IIPA urges the Philippine government to get ahead of the problem of Internet piracy before it spirals out of control. IIPA recommends empowering the NTC to work closely with the IPO Philippines to act aggressively against Internet piracy and to deal with mobile device piracy, and enhance anti-piracy enforcement work carried out by OMB by including mobile device piracy within its purview. Recent meetings between industry and the IPO together with ISPs, the NTC, and NBI indicated some helpful willingness on the part of ISPs to address online piracy if they have a legal basis. Both the new Copyright Law, which contains principles of secondary liability, as well the E-Commerce Law, together should provide a preliminary basis to take action such as disabling access to infringing materials online. In the meantime, right holders have had to resort to self-help and voluntary cooperation among services and ISPs. In one example, involving *Soundcloud.com*, the music industry group PARI reports very good success in taking down sound recordings illegally uploaded by users.

Remedy Enforcement Bottlenecks Within DOJ: IIPA has long reported bottlenecks in the preparing of criminal cases through the DOJ prosecutors. IIPA now understands DOJ has farmed out the filing of IP cases to city prosecutors' offices. DOJ will accept the filing of “high profile” IP cases on a case-by-case basis. Whether the farming out of the filing of IP cases will be beneficial remains to be seen. In a related development, the DOJ “IP Manual for Prosecutors and Law Enforcement Agents” was, according to IPO, ready in October 2012, and should be issued and distributed as soon as possible.

Getting to the Source – Customs “Choke Points” and Optical Media “Burning”: The IPO Philippines has indicated a new approach to hard goods piracy is to seek choke points, e.g., through Customs at the airports and other ports throughout the Philippines, to reduce the numbers of imported discs over time. IIPA supports this approach which seems to have had positive results in late 2011 seizures.¹⁹ We also recommend that OMB be given purview over seizing “burned” discs and “burning” machinery detected during raid actions, as well as added authority to take action against mobile device piracy and “media box” piracy. This added authority of the OMB to take action

¹⁸The *Multilinks* case was brought against the printing operation being run by Mr. and Mrs. Marquez, who were engaged in unauthorized reprinting of medical text books. A previous case against Catherine Marquez was moderately successful, resulting in the defendant's conviction, but the conviction has not been served as the defendant absconded. Mr. Marquez is a co-defendant in the current *Multilinks* proceeding, which has been plagued by delays.

¹⁹In early December 2011, the Bureau of Customs reportedly turned over hundreds of boxes of Blu-ray Discs (in high-quality tin cans) and Christmas Videoke DVDs containing mixed English/Filipino songs. These pirated optical media were detected at the Manila (Sea) Port using Customs' x-ray machines. The estimated market value of seized pirated products was P35 Million or over US\$800,000.

against mobile device piracy would be very strategic since these cell phone stalls/kiosks are usually in areas with reported hard goods piracy problems.

Further Addressing Camcording Piracy: One of the great success stories in recent years in the Philippines as well as throughout Asia has been the passage and implementation of the anti-camcording law (Philippines Republic Act No. 100,088) in 2010, which saw an impressive reduction in forensic matches back to the Philippines of illegal camcords of major motion pictures. Before the Philippine anti-camcording law was passed in 2010, there were 86 cases between 2008 and 2011. Since the start of 2012, there have been just four. Industry has also invested significant resources in training, and appreciates the support of the Philippine government in attending to this important aspect of implementation of the Law. Cinema owners have done their part as well, such that in 2011, there were a total of 49 interdictions by cinema security staff, resulting in five court actions which remain pending. Despite these successes, more needs to be done. For example, of the interdictions, the Philippine authorities admit that in well over a dozen cases, the police ended up erasing the contents of the illegal camcorders. In addition, we still do not have the first criminal conviction under the new Act. It is critical that the government hone in on the problem of illegal camcording, since camcording is particularly damaging in the Philippines, fueling rampant online piracy, negatively impacting worldwide distribution, and preventing 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.

Enforcement Against Street and Retail Piracy: The overwhelming success story in the Philippines remains the response to hard goods piracy in Metro Manila, which has been driven underground. This is due in part to unprecedented enforcement actions. For example, IPO Philippines noted in a December 2012 letter the seizure of P5 billion Pesos worth of pirated/counterfeit materials between January and November 2012, although even this is dwarfed by reported seizures in 2011 of nearly P8.4 billion worth of counterfeit and pirated goods. OMB reports over 2,600 administrative complaints in 2012, resulting in 16 court cases and 45 active prosecutions. The MOU between OMB and PNP has resulted in PNP officers becoming more attentive to the problem of open physical street and mall piracy and resulted in seized pirated optical media increasing dramatically during the peak of the implementation period. The pilot implementation period of the MOU produced some issues of communication to all police precincts and transportation of the seized items back to Manila, but the revised MOU will deal with these issues.

Transformation From Piracy to Legitimacy: One of the most remarkable aspects of the fight against once-rampant hard goods piracy is the way IPO DG Blancaflor has worked together with other agencies to seek a total transformation of the pirated DVD/CD vendors into legitimate business owners. IPO, OMB, Department of Trade and Industry (DTI), Department of Tourism (DOT), National Commission on Muslim Filipinos (NCMF), Department of Social Welfare and Development (DSWD), and private groups, are working to turn the pirate vendors to legitimate businesses, with government mainly waiting for funding, but private groups already participating to be part of the transformation. Looking at Quiapo today, legitimate stores like restaurants, textile shops, and clothing shops line the area. The same transformation can be seen in other previous piracy hotspots like Harrison Plaza, Makati Cinema Square, and St. Francis Square. IIPA commends the government and private sector for working toward a holistic resolution of the piracy problem in the Philippines, which can have other beneficial societal effects.

Issuance of New Supreme Court Rules of Procedure for Intellectual Property Cases Gives Hope for Greater Deterrence in Future Cases: The issuance in October 2011 of the Supreme Court of the Philippines Rules of Procedure for Intellectual Property Cases, (A.M. No. 10-3-10-SC, En Banc) (effective November 8, 2011) holds the promise of more and speedier civil and criminal trials. The Rules also bring with them the designation of 65 regional trial courts (22 in the National Capital Region and 43 in other regions) to improve adjudication of IPR cases. The Rules bring about a number of critical improvements, namely, they impose time limits that dictate case closure within about half a year, provide for civil and criminal search and seizure orders, confirm strong presumptions of subsistence and ownership, and address other evidentiary issues that have been and remain of concern. While they do not resolve entirely the warrant quashal issue that has plagued right holders over the years, the Rules may help

since warrants will be granted by the new Commercial Courts (with specialized IP expertise), not by the “Executive Judge” of the local trial court, which in the past led to many of the quashals.²⁰ The Rules for the most part appear to strengthen the hand of right holders and make court processes speedier and smoother with respect to copyright cases,²¹ and it is hoped the Rules as implemented will result in a more effective judicial remedy.

Up until the issuance of the new Rules, there had only been five criminal convictions under the Copyright Act (and three under the Optical Disc Act) (we have provided the case list in previous submissions). To our knowledge there were no criminal convictions in 2012 for copyright piracy. The largest criminal fine ever imposed in the Philippines for copyright piracy was a modest P200,000 (approximately US\$4,300 at the time), 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). IIPA has documented the many problems in the criminal trial process in previous submissions. It is hoped the new Rules will help resolve these longstanding deficiencies in the judicial system. In the meantime, the regular civil court system remains backlogged and extremely slow (an estimated 7,000 civil cases are presently backlogged at the Supreme Court). To assist with a strong implementation of the Rules, we suggest that a “judge swap” occur between the U.S. and the Philippines. In addition, training for prosecutors on techniques in copyright cases should occur.

COPYRIGHT LAW AND RELATED ISSUES

New Copyright Law Through Bicameral Conference: Copyright protection is governed under Republic Act 8293, the Intellectual Property Code of the Philippines (in force January 1, 1998). The Philippines acceded to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) in 2002. The Philippine government has been considering IP Code amendments for over a decade; IIPA has weighed in on many occasions on various versions of the draft amendments. We understand as of late January 2013 that the Bills have passed both the House and Senate and have gone through bicameral conference, meaning the amendments are likely to enter into force in 2013.

The Bills contain many elements needed to establish a fully modern copyright system, but do not contain all of the strong elements contained in previous bills. We support: i) granting the IP Office of the Philippines greater enforcement functions, ii) the broad definition of the “communication to the public” critical for protection of copyright in

²⁰One of the most problematic aspects of the Philippine court system has been the challenges by defendants and quashals of warrants based on the argument (or a variation) that the police officer obtaining the warrant based on probable cause did not personally witness the infringement taking place. A line of decisions beginning with *Solid Laguna (Sony Music Entertainment (Phils), et al v. Hon. Judge Dolores Español et al* (G.R. No 156804, March 14, 2005), *Telmarc Cable (Telmarc Cable v. Hon. Antonio M. Eugenio, Jr., CA-G.R. SP. No. 96767 May 31, 2007)*, and *Powermac Centre Company* (2008), all undermined the Supreme Court's decision in the *Columbia* case, which held that “testimonial or documentary evidence, depositions, admissions or other classes of evidence tending to prove the *factum probandum*” is sufficient for issuance of a warrant, “especially where the production in court of object evidence would result in delay, inconvenience or expenses out of proportion to its evidentiary value.” This line of cases and more recent cases calls into question whether a search warrant is “available” as required under the TRIPS Agreement, and has been discussed in greater detail in previous IIPA Special 301 reports on the Philippines.

²¹The following are some highlights of the Supreme Court of the Philippines Rules of Procedure for Intellectual Property Cases, (A.M. No. 10-3-10-SC, En Banc) (effective November 8, 2011) with a few additional questions:

- The Rules place searches, seizures, warrantless arrest, pre-trial, trial, and provisional measures such as destruction of pirated materials, in the hands of these commercial courts.
- The Rules set time limits for all aspects of an IP case from pre-trial (except “court-annexed mediation” for the civil portion of the criminal claim which appears to have no time limit) to trial, with 30 days for pre-trial, then possible judgment (if no issues for trial remain) within 30 days, or, if there are issues, trial, which apparently may last no longer than 150 days.
- Rule 10, Section 2 provides that the Special IP Commercial Courts have purview over criminal searches and seizures, taking them out of the hands of the “Executive Judge” which we understand may have been the cause of previous quashals. The criminal complaint must then be filed 60 days from issuance of the Order.
- Rule 11, Section 4 leaves consideration of motions “to quash a search warrant or to suppress evidence obtained thereby or to release seized goods” in the hands of the trial court.
- Rule 16, Section 1 confirms that copyright infringement is subject to strict liability. Rule 16, Section 2 still requires consularization of copyright registration certificates, although Rule 19, Section 1 provides a strong presumption of subsistence and ownership, which can only be rebutted by “evidence” to the contrary (not merely placing subsistence or ownership into issue). Rule 19 confirms that registration is not a condition to “a claim of copyright infringement.”
- While Rule 20 provides for destruction of infringing materials, labels, etc, it does not include machinery (materials and implements) used in the infringement which appears to be a drawback.

the online (and mobile) environment, iii) the express “making available” right for related (but this should be expanded as the general rule to all communications to the public), iv) the confirmation that temporary reproductions are covered under the reproduction right (subject to the “fair use” defense as defined in Section 185 as amended), v) the addition of an exportation seizure remedy, vi) the provision of “double” damages and mandatory maximum sentences for unlawful “circumvention,” and vii) the helpful enforcement disclosure requirements. There remain some aspects of the Bills that need clarification or revision and are not as strong as previous bills (like SB 2628). It is hoped that many of these issues can be resolved with implementing regulations or even in explanatory memoranda. Among IIPA’s chief concerns are:

- **Technological Protection Measures (TPMs):**

- The Bills lack explicit coverage of access control TPMs. Previous bills were superior in that they defined TPMs to include both measures used to restrict unauthorized access as well as the exercise of exclusive rights. By contrast, the current Bills may need some further interpretation, possibly through implementing regulations, to confirm coverage of “access control” TPMs. It may be that the drafters intend the phrase “restrict acts ... which are not authorized ... or permitted by law” to include access controls, but alternative wording, “any technology, device or component that, in the normal course of its operation, controls access to a protected work,” which was in previous drafts was clearer and preferable. We suggest that the term be clarified in implementing regulations to provide the latter quoted explanation.
- The Bills contain no prohibition on trafficking in or providing services related to circumvention devices, technologies, or tools, prohibiting only the act of circumvention expressly.²²
- The Bills deem the circumvention of TPMs merely as an aggravating circumstance.

- **Civil Damages/Statutory Damages:** The Bills retain statutory damages, and provide a structure for additional damages (“in lieu of actual damages and profits, such damages which to the court shall appear to be just and shall not be regarded as penalty”). While the minimums set are low at US\$1,140, it should be confirmed in explanatory notes or implementing regulations that the recovery amount is “per infringement.” In addition, the meaning of statutory damages “in a sum equivalent to the filing fee of the infringement action” is unclear. This should be clarified. Ultimately, the proof will come in whether civil cases result in damages “adequate to compensate for the injury the right holder has suffered” as required by TRIPS Article 45.

- **Duty to Account:** The House Bill introduces a new 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 author subject to an accounting, which may be the intention of the drafters, but in this case, IIPA is concerned that the insertion of a duty to account to all licenses or assignments may unduly interfere with the exercise of exclusive rights by right holders and impinge on their freely negotiated licenses and assignments. The Senate Bill appears less harmful and restrictive as it simply indicates, “The copyright owner has the right of regular statements of accounts.” In the Bicameral Conference, the Senate version should be adopted.

- **Exceptions:** Several exceptions in the Bills must be examined and altered to ensure they meet the Berne Convention three-step test.

²²A previous Senate bill 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. It is hoped that the definition of “circumvention” could be confirmed in the explanatory memorandum and in implementing regulations to cover these trafficking activities. If the outlawing of trafficking and circumvention services are not covered, and/or access controls are not covered, the Bills cannot be said to fully implement the WCT and WPPT.

- **Exception for the visually impaired:** The House Bill 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.” The Bill contains some limiting provisos, including that the reproduction and distribution be “on a non-profit basis” and that it comply with the three-step test (i.e., the 2nd and 3rd steps). It contains the worrisome phrase “this distribution is also permitted in case the copies have been made abroad and the conditions mentioned have been fulfilled.” It should be confirmed in implementing regulations or in the explanatory memorandum that the phrase “the conditions mentioned have been fulfilled” means that only lawfully made or distributed copies would be subject to this exception. The Senate Bill (draft Section 184(l)) suffers from potential over-breadth (for example, it is not expressly subject to the three-step test), but at least it does not expressly permit copies made abroad to be distributed; in the Bicameral Conference, that part of the Senate Bill should be adopted.
- **Library Exception Broadened:** The House Bill broadens 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. Further, this exception should be subject to the three-step test and limited to copies necessary for archival purposes and for preservation of the work.
- **Decompilation Exception:** The House Bill includes a “decompilation” exception for software. The current version no longer contains 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.” In the House Bill this reads “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 included in explanatory memoranda or implementing regulations.
- **Exploitation Right in Audiovisual Works:** The current Bills are missing a provision (in previous draft bills) ensuring 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 Secondary Liability:** The House Bill 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.” This appears in the physical environment to create a structure for landlord liability, and in the online space (particularly in prong 3) provides a modified form of contributory liability as understood in the U.S. The phrase “given notice” should, in the explanatory memorandum, be understood to include constructive knowledge (e.g., red flag knowledge, such that liability will attach if one has awareness of facts or circumstances from which infringing activity is apparent).
- **Importation Right:** The House Bill leaves out a provision included in previous draft bills which would have added an “importation” right to the current distribution right, since a key component of many laws is to provide the author with the ability to authorize imports and prevent unauthorized imports.
- **Designation of Agent to Enforce Rights:** The House Bill is not entirely clear in defining who may enforce rights on behalf of copyright owners, and would introduce a new collective management regime. This formal introduction of accreditation of a “collecting society” system must not be implemented in a way to restrict the activities of the “collecting society” such as its tariff structure and should not restrict the number of collecting societies operating 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 Bills removed this important and positive change.

Service Provider Issues: While the new IP Code, when enacted, will spell out with specificity some important criteria for secondary copyright liability, the E-Commerce Law 2000 (Republic Act No. 8792) already deals with specific issues of copyright liability for Internet infringements as well as the role of service providers. First, the Law contains a general copyright provision outlining infringements involving the Internet (or other devices using telecommunications).²³ Second, the Law 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 mostly helpful in setting forth important liability principles, but the Law should be modernized 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 non-hosted infringements and 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.”

MARKET ACCESS ISSUES

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 high 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. There is a 15% tax on royalty remittances (to producers) on profit remittances or dividends. These oppressive tax burdens detrimentally impact the development of a legitimate audiovisual business.

Foreign Ownership Restrictions for Media Companies: Foreign investment in mass media, including the pay-TV sector, is strictly prohibited under the Philippines Constitution. Draft cable legislation dating back to 2005 remains under consideration, but if enacted, would allow for up to 40% foreign ownership/investment in cable systems that do not produce their own programs or content. As the broadcast industry moves towards a converging environment where operators are encouraged to provide both infrastructure and content, such restrictions will continue to impede development of the cable television market.

Television Restrictions and Local Agent Requirement: In October 2003, the NTC signed Implementing Rules and Regulations Governing Community Antenna/Cable television (CATV) and Direct Broadcast Satellite (DBS) Services to Promote Competition in the Sector. The rules limit the ability of content providers to enter into exclusive distribution agreements with local cable providers. Prior exclusivity arrangements are presumed valid, but may be subject to NTC review at its discretion, while future exclusivity arrangements are deemed presumptively anti-

²³Section 33(b) of the E-Commerce Act provides, “Piracy or the unauthorized copying, reproduction, dissemination, distribution, importation, use, removal, alteration, substitution, modification, storage, uploading, downloading, communication, making available to the public, or broadcasting of protected material, electronic signature or copyrighted works including legally protected sound recordings or phonograms or information material on protected works, through the use of telecommunications networks, such as, but not limited to, the internet, in a manner that infringes intellectual property rights shall be punished by a minimum fine of One hundred thousand pesos (P100,000.00) and a maximum commensurate to the damage incurred and a mandatory imprisonment of six (6) months to three (3) years.”

competitive and must be approved by NTC. In addition, the regulations require foreign content providers to maintain a local agent if they have such exclusive agreements in place. These regulations add costs, delays and uncertainty and limit the ability of motion picture companies to distribute content in the Philippines. They should be discarded.

Customs Duty for Films Should Remain Based on the Physical Carrier Medium: In 2010 and 2011, the Philippines Bureau of Customs considered reinterpreting its customs valuation of imported film prints to a transaction value assessment that included royalties generated from the exhibition of the film. Such a duty assessment would have been a violation of the World Trade Organization's Customs Valuation Agreement, since prints are not generally "sold" into the Philippines, thus rendering the application of the transaction value (not to mention the inclusion of royalties) a moot point. By the beginning of 2012, Customs moved away from royalty assessments, but it remains unclear what method of valuation is now being utilized, or whether such method is being applied uniformly across the board. This issue requires continued monitoring.

Potential Introduction of Restrictions on Advertising: Over the years, a number of bills have attempted to limit advertising on pay-TV. Restricting advertisement placement should be avoided, as it 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.

GENERALIZED SYSTEM OF PREFERENCES

The Philippines enjoys preferential trade benefits under the Generalized System of Preferences trade program. Among the criteria the President must take into account in determining whether a country should continue to be designated as a GSP beneficiary country are "the extent to which such country is providing adequate and effective protection of intellectual property rights," and "the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets ... of such country." 19 USC 2462(c)(4) and (5). During the first eleven months of 2012, almost US\$1.15 billion in imports to the U.S. from the Philippines enjoyed duty-free treatment under the GSP Program, or more than 12.9% of the Philippines' entire imports into the U.S.²⁴ The Philippine government needs to continue to endeavor to meet the adequate and effective test under the statute to remain eligible to receive favorable treatment under the GSP program.

²⁴During 2011, more than US\$1.13 billion in imports to the U.S. from the Philippines enjoyed duty-free treatment under the GSP Program, or more than 12.4% of the Philippines' entire imports into the U.S.