

THE PHILIPPINES

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

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

Executive Summary: IIPA lauds 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 sustained and effective anti-piracy activities around the country that have resulted in reduced physical piracy in Metro Manila and beyond, even with very little budgetary support. In 2013, the physical book piracy problem improved somewhat in Metro Manila. However, significant concerns remain, including unauthorized on-demand photocopying along with the use of social media platforms to sell unauthorized e-books, medical textbooks, reference materials, fiction books, and non-fiction titles. Increasingly, mobile device “repair” shops double as piracy portals. The number of illegal instances of camcording of major U.S. motion pictures off the movie theater screen tripled in 2013. New IPO Enforcement Rules, issued October 6, 2013, now permit physical piracy visits in plain-view cases, but the Rules do not create authority to investigate online infringements, and the current laws do not establish a mechanism to address non-hosted online piracy. IPO has engaged judges, prosecutors, and law enforcement to sustain enforcement efforts; this engagement should continue. The recently-formed National Committee on Intellectual Property Rights (NCIPR)² should be proactive in taking actions against all forms of piracy. Secretary of State Kerry’s visit in December 2013, and the commencement of technical discussions toward the Philippines potentially joining the Trans-Pacific Partnership (TPP) trade pact, can hopefully trigger progress in addressing the concerns raised herein.

PRIORITY ACTIONS REQUESTED IN 2014

Enforcement

- Implement the Supreme Court Rules of Procedure for IP Cases to remedy bottlenecks and provide for speedier and more effective civil/criminal pre-trials and trials, effective search warrants, and deterrent criminal convictions.
- Encourage the NCIPR to undertake targeted deterrent actions against online, camcording, software, book, “media box,” signal theft, and mobile device piracy; provide the Philippine National Police with *ex officio* authority.
- Coordinate further discussion among ISPs and e-commerce sites, copyright owners, and enforcement agencies, leading to commencement of effective enforcement against online and mobile piracy in the country.
- Increase the budget of the OMB so it can continue to conduct nationwide enforcement efforts.
- Maintain enforcement efforts, including prosecutions where necessary, under the Anti-Camcording Act of 2010.

Legislation

- Modernize laws, e.g., the E-Commerce Act, to facilitate measures to deal effectively with non-hosted infringements (as well as traditional notice and takedown).
- Include CD-R burning, mobile device piracy, “media box” piracy, and border enforcement in OMB’s purview under the Optical Media Act.

¹For more details on the Philippines’ Special 301 history, see previous years’ reports at <http://www.iipa.com/countryreports.html>. For the history of the Philippines’ Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA’s 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>. IIPA acknowledges the terrible devastation of Typhoon Yolanda, and expresses our condolences and sympathies to those who have been affected by the tragedy and our wishes for a speedy process of recovery and reconstruction.

²NCIPR comprises IPO, Department of Trade and Industry (DTI), Department of Justice (DOJ), Department of the Interior and Local Government (DILG), Bureau of Customs (BOC), National Telecommunications Commission (NTC), National Bureau of Investigation (NBI), Philippine National Police (PNP), OMB, National Book Development Board, and the Bureau of Food and Drugs.



- 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 Government entities are forbidden to purchase illegal software, and will allow only suppliers of legitimate software to participate in government bidding.

PIRACY AND ENFORCEMENT UPDATES IN THE PHILIPPINES

Prior IIPA reports on the Philippines contain detailed discussions of piracy and enforcement issues. This report serves only as an update to those and is not to be considered an exhaustive review of issues.³

Camcording Piracy Once Again on the Increase: The passage and implementation of the anti-camcording law (Philippines Republic Act No. 100,088) in 2010 initially led to an impressive reduction in the number of forensic matches traced back to the Philippines of illegal camcords of major motion pictures. Regrettably, however, 2013 saw a sharp increase in the number of detections of major U.S. motion pictures sourced to the Philippines, from four in 2012 to twelve in 2013. It is critical that the Philippine Government take greater steps to detect and address illegal camcording, since camcording fuels online piracy, negatively impacts worldwide distribution, and prevents the establishment of legitimate online distribution platforms. Camcording remains a lucrative path for pirates in the Philippines, since films released in theaters on the same date in the Philippines and the U.S. (“day-and-date” release) screen more than half a day earlier than a U.S. release.

Software Piracy (Enterprise End-User, Hard Disk Loading, Internet Café) Causes Significant Losses: The use of unlicensed software continued to cause significant revenue losses to the software industry in 2013, thereby stunting the growth of the information technology sector. The software piracy rate increased to 70% in 2011, 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.⁴ While more must be done, the software industry notes the success of Philippine Government visits in seeking enterprise software legalization. In 2013, software companies reported more than 20 end-user visits by IPO and OMB, with 2 additional end-user raids by NBI.⁵ Hard disk loading, the pre-installation of unlicensed software or other copyright materials on new PCs or other devices, remains a persistent problem with computer stores and computer parts stalls. Use of unlicensed software in Internet cafés remains rampant. IIPA recommends that the Philippine Government conduct audits of Internet cafés and revoke business licenses of those found to allow the unauthorized use of content.

Commitment to Legalize Software Use by Government Agencies Still Not Fully Implemented: It remains important that the Philippine Government work to fully legalize government software use and have procurement practices in place to pay for software. Republic Act 9184 must be implemented to ensure Philippine Government agencies refrain from purchasing illegal software and allow only suppliers of legitimate software to participate in government bidding.

Mobile Device Piracy Becoming a More Serious Concern: IIPA has noted in previous reports the significant increase in mobile penetration, and there are now increasing reports of infringing wireless application protocol (WAP) systems, which provide pirate content directly through wireless communications onto mobile phones/devices. In addition, vendors that sell and supposedly “repair” mobile devices actually offer, either at the time of sale or afterwards, to download onto devices (including cell phones, tablets, mp3 players, hard disks, thumb/flash/USB drives) all kinds of infringing content. Unfortunately, OMB does not have jurisdiction over mobile device piracy. In the meantime, the recently formed NCIPR should take proactive steps to remove this form of piracy from the market in the Philippines.

³See, e.g., IIPA, *Philippines*, 2013 Special 301 Report, February 8, 2013, at <http://www.iipa.com/rbc/2013/2013SPEC301PHILIPPINES.PDF>.

⁴Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at www.bsa.org/globalstudy. This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.

⁵This compares with more than 30 end-user visits by IPO and OMB in 2012, with 3 additional end-user raids by NBI.

Emerging Internet Piracy Requires Law Reform, Enforcement Response: While access to the Internet in the areas outside Metro Manila is still not that well established, Internet penetration in the cities is growing. Internet piracy is growing along with it, through P2P file-sharing services, BitTorrent file-sharing, deep linking, blogs providing links to pirate materials, and cyberlockers used to store infringing material, to which pirates then sell passwords for illegal access. The Entertainment Software Association (ESA) reports that in 2013, the Philippines placed 18th 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. In some cases, websites fostering piracy are located outside of the Philippines, as in the case of *kat.ph*. While that case remains ongoing, IPO seized the domain *kat.ph* in June 2013, and the service then migrated to *kickass.to* in mid-2013. Users in the Philippines remain targets for the piracy activities of the site. We commend the IPO and the Philippine Government for taking aggressive action to the extent possible under current law.

ISPs have at least indicated a willingness to cooperate, and may be amenable to an approach to address access to non-hosted content upon a legal order from the Government and according to the laws. Pending needed legal reform, we recommend further engagement, with the helpful assistance of the Philippine Government in arranging such consultations among the ISPs, copyright owners, and enforcement agencies.

Decrease in Availability and Openness of Hard-Goods Piracy: Due in large part to the efforts of the OMB and cooperation of IPO, the number of stalls in Metro Manila and availability of pirated DVDs and CDs has decreased, while street vendors who used to travel on foot with giant backpacks full of pirated products now carry very few discs at a time. Most pirate product in Metro Manila is sold underground or in concealed stalls. IIPA notes positively the issuance of new IPO Enforcement Rules in October 2013 to allow the IPO to investigate, upon complaint, physical piracy occurring in plain view (but the Rules do not create authority to investigate online infringements which should be remedied). This approach is quick and cost-efficient, and in many cases, IPO visits are translating into positive results, without the need for a further administrative complaint.

Court Processes Should be Further Streamlined for Efficiency and Consistency: IIPA continues to be made aware of some difficulties in the court system, with mixed reviews over the speed and efficacy of the criminal inquest and “preliminary investigation” process by prosecutors. While the search warrant quashal issue has largely abated,⁶ there are still some complaints about law enforcement and DOJ misapplying “probable cause” in preliminary investigations in criminal cases.⁷ Even when prosecutors have applied the standards correctly and acted expeditiously, court cases can drag on for years. Two long-running criminal cases against the Marquez defendants’ photocopy piracy operation (this time against Mr. Marquez) finally came to successful conclusions in late 2013 and early 2014. In both cases, defendant Mr. Marquez was convicted of criminal copyright infringement and sentenced to at least 18 months imprisonment in addition to being assessed over \$20,000 in fines. Still, the defendant was granted “provisional liberty” while the cases are on appeal, and there is concern the defendant will abscond. In general, the police have shown little interest in looking for defendants who disappear after the criminal raid process has been completed. In other cases, it appears that the threat of criminal prosecution has exerted some pressure on infringers, as industry reports some defendants are willing to settle in order to avoid criminal prosecution. IPO is engaging directly with prosecutors and judges, which IIPA supports. In addition to this engagement, full implementation of the Supreme Court Rules of Procedure for Intellectual Property Cases should hopefully provide for more expeditious and effective civil and criminal pre-trials and trials, effective search warrants, and deterrent criminal convictions.

OMB Still Requires Adequate Funding: For many years, IIPA has indicated that OMB remains hampered by the lack of an adequate appropriated budget. This should be remedied, so that OMB can procure the proper equipment and resources needed to tackle piracy in all its forms, including software inspections in cooperation with IPO visits.

⁶See IIPA, *Philippines*, 2013 Special 301 Report, for more detailed history of the issue of search warrant quashal.

⁷“Preliminary investigation” is an inquiry or proceeding to determine whether there is sufficient ground to engender a well-founded belief that a crime has been committed and the respondent is probably guilty thereof, and should be held for trial. It is not required in cases of warrantless arrest.

COPYRIGHT LAW AND RELATED ISSUES

More Effective Laws to Halt Online Infringement Needed: The Philippine Government remains somewhat limited in what it can do under the current laws to address both hosted and non-hosted content. The E-Commerce Act and other laws should therefore be amended to provide an effective tool against both phenomena. The laws should provide both for notice and takedown of hosted content, as well as for fair and effective measures to remove availability in the Philippines of non-hosted infringements, whether through the Bureau of Legal Affairs (BLA) and the courts or other fair and effective means.

OMB Should Be Empowered to Address Relevant Forms of Infringement: OMB currently lacks jurisdiction to enforce against CD-R burning, mobile device piracy, “media box” piracy, and border enforcement. These should be added to OMB’s purview by amending the Optical Media Act.

Other Comments on Current Copyright Regime: Copyright protection is governed under Republic Act 8293, the Intellectual Property Code of the Philippines (in force January 1, 1998, last amended on March 23, 2013).⁸ Previous IIPA submissions have identified a number of issues that should be addressed with further fixes to the law. On technological protection measures, IIPA encourages the Government to amend the law to: 1) explicitly cover access control TPMs; 2) prohibit trafficking in circumvention technologies, software, devices, components, or services related thereto; and, 3) provide deterrent civil, administrative, and criminal remedies for TPM violations, rather than simply having TPM offenses be an aggravating circumstance. TPMs are crucial to new distribution models, which make content more widely available, on more devices, and add significant convenience to consumers. Legal protections against circumvention of TPMs are an increasingly critical aspect of a modern copyright system.

In addition, IIPA continues to highlight the need for the law to: 1) ensure civil damages are adequate to compensate the right holder for injury suffered as required by TRIPS, and provide per infringement statutory damages; 2) ensure that the duty to account does not constitute an unreasonable restriction on the ability of the parties to freely contract; 3) restore the right to “exploit” an audiovisual work in the producer; 4) include within the meaning of “notice” (in the landlord liability provision) the concept of constructive knowledge; 5) ensure that new provisions on designation of an agent and collective management do not restrict the tariff structure in the Philippines or restrict the number of collecting societies operating in the Philippines; and 6) enact copyright term extension which was previously proposed.

MARKET ACCESS CONCERNS

Several market access issues continue to hinder legitimate right holders operating in the Philippines. These include: 1) unreasonable taxes and duties on motion picture businesses; 2) foreign ownership restrictions for media companies; 3) potential limitations on the ability of audiovisual content providers to enter into exclusive distribution agreements with local cable providers; 4) vague methods of valuation of Customs duties for films, which should remain based on the physical carrier medium; and 5) potential introduction of restrictions on advertising by right holders on pay TV channels.

⁸Republic Act No. 10372, “An Act Amending Certain Provisions of Republic Act No. 8293, Otherwise Known as the “Intellectual Property Code of the Philippines,” and for Other Purposes.”