

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2005 SPECIAL 301

COUNTRIES DESERVING SPECIAL MENTION

AZERBAIJAN

As the U.S. Trade Representative noted when Azerbaijan was placed on the Watch List in 2004, there are many steps remaining for Azerbaijan “to fully implement the 1995 U.S.-Azerbaijan Trade Agreement and address deficiencies in its IPR laws.” In fact, Azerbaijan obligated itself to fix these deficiencies over ten years ago in the bilateral agreement with the United States (after an April 1993 exchange of letters); that agreement entered into force on April 21, 1995. The current Azerbaijani Copyright Law, in force since October 23, 1996, has many deficiencies which need to be corrected in order to bring the country into compliance with the Berne Convention (to which it adhered in 1999) and the Geneva Phonograms Convention (which it joined in 2001). The long delay in the protection of sound recordings has allowed unprotected back-catalog material to flow into the marketplace.

Legal reform deficiencies: Azerbaijan does not clearly provide protection for pre-existing works or sound recordings as required by the obligations under the bilateral trade agreement, the Berne Convention, and the WTO TRIPS Agreement. Also unclear is whether Azerbaijani law provides civil *ex parte* search provisions as required by TRIPS.

Article 158 of the Azerbaijani Criminal Code (2000) provides liability and sanctions for copyright and neighboring rights infringements if they result in “significant damage” to the rightholder concerned. The “significant damage” standard creates an unwarranted threshold in the fight against copyright piracy because it sets a vague standard for police and prosecutors to commence action. The law should be amended to include a low and clear threshold to instigate a criminal action, for example, 50 times the minimum daily wage. There have been to date, no known convictions under this law.

Neither the Criminal Code nor the Criminal Procedures Code provides police with the proper *ex officio* authority to commence criminal copyright cases. These laws should be amended accordingly to provide the authority necessary for effective enforcement. It is not clear that the Azerbaijani Customs Code (last amended in 1997), which in Article 19 contains provisions relevant to the importation or export of intellectual property, provides *ex officio* authority for customs officials to seize material at the border as required by the WTO TRIPS Agreement. This authority must be clearly provided, and if needed, the Customs Code revised. Last, the Azerbaijani government should be encouraged to accede to and fully implement both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

Enforcement deficiencies: There is currently no “adequate and effective” enforcement in Azerbaijan. There is no meaningful police, customs, or prosecutorial activity, as required by the bilateral trade agreement and the WTO TRIPS Agreement. There are administrative sanctions (Article 186-1) providing for fines of 20 times the minimum monthly wages for copyright

infringements. However, these fines are only imposed if the infringement causes damages that equal more than ten times the minimum monthly wage. For another year, the copyright industries reported that there was not a single known case where either the administrative sanctions or any of the criminal penalties were levied. An estimated 11.8 million pirate copies of audio carriers including 8.6 million cassettes and 3.2 million CDs were available in the Azerbaijani market in 2004. Piracy rates for the music market writ large were an estimated 81.6%, and as for international repertoire — over 90%. Losses suffered by American rightholders amounted to US\$12 million and overall losses of international rightholders exceeded US\$17 million.

There were no reports on cases resulting in either administrative or criminal sanctions for neighboring rights infringements. Cases regarding copyright violations brought on behalf of Azerbaijani rightholders are usually considered in civil courts. There are no reports of any counterfeit audio products of international rightholders seized during the past several years.

There are no separate subdivisions or specially appointed officers dealing with the intellectual property infringements within the Azerbaijani law enforcement agencies.

BAHAMAS

Copyright law deficiencies: Copyright legislation in The Bahamas is poor. The copyright law does not provide protection for foreign sound recordings; it has not joined the Geneva Phonograms Convention, nor joined the WTO (which would afford protection for sound recordings, nor has it ratified or implemented the WIPO Performances and Phonograms Treaty (WPPT). Moreover, with respect to other works, The Bahamas is a party only to the Brussels Act (1948) of the Berne Convention. The immediate impact of these inadequacies is that international sound recordings do not receive the same treatment as local sound recordings and that Internet exploitation of music may be unprotected. Moreover, The Bahamas may lack border measures to prevent the trafficking of counterfeit products.

The Bahamas must improve its national legislation by, at a minimum, ratifying the WPPT, the WIPO Copyright Treaty (WCT), and the Paris Act (1971) of the Berne Convention, and amending its domestic legislation accordingly to meet the obligations in these treaties as well as the requirements of TRIPS. Additionally, it must organize enforcement actions that would discourage the sale of pirate products.

Enforcement deficiencies: Little or nothing is currently being done to provide effective enforcement against the spread of physical goods piracy. We are not aware of any police actions that serve as real deterrents against the commercial sale of pirate goods. The lack of adequate legislation and enforcement discourages potential local and international investments and threatens the growth of a local music industry. The Bahamas has the potential to be a successful market for the legitimate recorded music industry due to high levels of tourism and per capita income. The legitimate industry is also very interested in the exploitation of local and international repertoire in public locations, including cruise ships, and by broadcasters.

Letters of agreement: On February 18, 2000, the Motion Picture Association and the Television Association of Programmers filed a Special 301 petition that highlighted the fact that the Government of The Bahamas had implemented a compulsory license that violated international copyright norms. As a consequence, the Government of the United States entered

into negotiations with the Government of The Bahamas. The negotiations resulted in an exchange of letters dated October 26 and November 9, 2000 constituting an Agreement between the two parties. Under that Agreement, The Bahamas committed to conform its cable compulsory license to international norms. Even though more than four years have now passed, The Bahamas still has not met its commitments under that agreement.

BANGLADESH

Piracy and enforcement deficiencies: IIPA members express concern about alarming piracy levels in Bangladesh, affecting works such as published materials, optical media, music cassettes and theatrical prints. There seems to be little or no political will to implement and enforce the copyright law

Rampant book piracy is practically pushing legitimate publishers and distributors out of the market altogether. This scourge affects all categories of books, including English language learning books, higher education textbooks, medical books and other professional titles, computer books, trade fiction, dictionaries and more. These books can be found throughout the country, at universities, professional schools and international schools as well as in book markets in cities such as Dhaka, Chittagong, Rajshahi and Khulna. Publishers estimate that fewer than one in ten books in use in Bangladesh is a legitimate version. To date, the government has taken virtually no action to combat this pervasive problem.

In addition, optical media and cassette piracy is blatant and there is almost no enforcement. Two pirate optical disc plants, with three lines each, are operational in Bangladesh, one of which is owned by a major Pakistani CD pirate producer. Furthermore, pirate CD-R duplication is spreading rapidly.

Finally, the motion picture industry has experienced repeated instances of theatrical print piracy, with titles being changed and fraudulently cleared through the Board of Film Censors. In some cases, these fraudulent prints are then contracted for exhibition throughout neighboring countries. Right holders are unaware of the presence of these pirated theatrical prints unless they are reported by legitimate distributors in the affected territories.

IIPA encourages the government of Bangladesh to work with the appropriate right holders in taking steps to significantly reduce these piracy levels.

BOSNIA AND HERZEGOVINA

Piracy and enforcement deficiencies: The lack of effective enforcement activities is problematic in Bosnia and Herzegovina. High levels of piracy in the business software sector are reported, including the widespread use of unlicensed software in both commercial and public enterprises. The overwhelming amount of music discs (largely on CD-Rs), video tapes and DVDs sold in the country also are pirate. CD shops routinely sell pirated business software, and computers regularly are sold with illegal software pre-installed. The music industry reports that CD shops located in urban areas tend to sell legitimate copies of regional and local repertoire. However, international repertoire is widely sold in street stalls by pirate vendors, and in numerous specialist shops located by, and catering to, troop bases of the multinational Stabilization Force (EUFOR) that serve in the country. Specialized CD shops are invariably

located in what are almost exclusively pirate music/games enclaves. Therefore, decisive action against the speciality shops and vendors should not be difficult for the Bosnian government authorities to undertake. Pirated CD-Rs containing music are produced in Bosnia and shipped into Croatia, disrupting that market as well.

Copyright law deficiencies: The business software industry (BSA) reports that the pertinent laws in Bosnia and Herzegovina do not provide adequate and effective protection of copyright. Deficiencies include: the absence of clear protection for temporary copies; a too-broad decompilation rule that is not in line with the EC Copyright Directive; and the fact that possession of illegal software for commercial purposes is not an infringement. Necessary amendments to the 2002 Copyright Act have not yet been adopted.

Enforcement deficiencies in the area of business software: Even more troubling, the present, albeit deficient, copyright law has not been applied in practice to date. An exception in 2004 — the first signs of IPR enforcement — consisted of several police raids against music and other IP pirates (these actions were undertaken in December 2004). Official results of the raids are not yet available; thus any assessment of these actions is premature. Such raids, although a positive step, are nonetheless isolated, and do not mitigate the overwhelming deficiencies in the field of IP protection. Police, prosecutors and customs officials still lack the equipment and expertise necessary to conduct raids, perform investigations, and commence cases against copyright infringers. Nor does the judiciary have the necessary training or experience with IPR issues. Most software users continue to use illegal software; licensed software is so rare as to be almost non-existent. In addition, the software industry understands that illegal software is in use by government institutions, including those responsible for enforcement of copyright and related rights law. Last, piracy at the border is a particular problem; customs authorities are not taking appropriate actions to prevent the shipment of pirated products to and across the country.

In order to achieve adequate and effective protection of intellectual property rights for all copyright industries, the government of Bosnia and Herzegovina must take immediate and decisive measures to establish an effective IPR enforcement regime.

BURMA

Copyright law deficiencies: Burma has been a WTO member since 1995. It is not, however, a member of the Berne Convention nor a signatory thereto, nor has it ratified or implemented the WIPO “Internet” treaties. The country does not have a modern intellectual property rights regime under which piracy may be adequately addressed. Like its Southeast Asian neighbors, the potential for migration into its territory of optical disc plants involved in infringing activities raises concerns.

CAMBODIA

On October 13, 2004 Cambodia became a full WTO member. Following enactment of its Copyright Law in 2003, Cambodia is now scheduled to accede to the WIPO Treaties in 2005 and to join the Berne Convention. The new Copyright Law appears to contain generally favorable provisions. It provides protection for temporary copies and against the circumvention of technological protection measures. Furthermore, it provides civil and criminal remedies,

including the recovery of damages and the confiscation and destruction of infringing equipment and materials.

Given the country's location, the potential for migration of more optical disc plants engaged in piracy remains a concern. The lack of an appropriate legal regime to address optical disc overproduction must be addressed to forestall such plant migration. It has already been confirmed that some small optical disc manufacturing is taking place in Cambodia, where one plant may have migrated to the capitol. Therefore, the Cambodian government should be encouraged to adopt comprehensive optical disc regulations and to have the appropriate regulations in place before pirate production becomes a significant problem.

The entertainment software industry reports that the 2004 U.K. Customs statistics included the seizure of two shipments of over 200 video games originating from the country. Book publishers also report an influx of illegal reprints pouring over the borders from Vietnam. Thus, Cambodia should be encouraged to take the appropriate measures to reduce the flow of pirated materials into and out of the country.

CANADA

In 2002, following extensive public consultations, the Canadian Government unveiled a three-tiered agenda for copyright reform in the form of a report presented to the House of Commons Standing Committee on Canadian Heritage (the "Committee"). The first tier (so-called "short term agenda") called for Canada to ratify the WIPO "Internet" Treaties, which Canada signed in 1997, in order to "ensure that Canadian rights holders will benefit from copyright protection recognized in all treaty countries." In order to do so, the Government identified necessary amendments to Canada's Copyright Act, including adoption of a making available right and protection for technological protection measures and rights management information. In June 2004 the Committee recommended that the Government of Canada immediately ratify the WIPO "Internet" Treaties and that legislation permitting such ratification be introduced in the House of Commons by mid-November 2004.

Although the Canadian Government's stated commitment to ratify the WIPO Treaties in the "short term" is laudable, the actions of the Canadian Government in this regard have been woefully inadequate. Nearly ten years after playing a major role in negotiating and drafting the WIPO Treaties, and roughly eight years after signing them, the Government of Canada still has failed to ratify, or even introduce legislation to implement them — in spite of repeated requests from the responsible Parliamentary Committee and statements of intent from the Government. Meanwhile, 50 countries worldwide, including all of the countries in North America apart from Canada, have ratified. Each year that Canada has failed to act on the WIPO Treaties, it has fallen further and further out of step with its trading partners.

Quick action on copyright reform is necessary, not only to harmonize Canada's regime with much of the world, but to ensure adequate and effective protection of copyright works in the digital environment. This was made clear by a 2004 Federal Court of Canada decision (BMG Canada, Inc. v. Doe, 2004 FC 488) that effectively legitimized Internet piracy of sound recordings of music — a decision that has left Canada not just out of step with its major trading partners in developing modern norms of protection, but in direct violation of its obligations under TRIPS to protect the reproduction right and to provide for effective infringement penalties. A subsequent decision of the Canadian Federal Court of Appeal, with respect to the private copying regime, found that copies made on fixed memory in MP3 players (and presumably on

computers' hard drives) do not fall within the private copying regime. Both decisions are under appeal.

Canada's out-of-date copyright law has created an environment of legal uncertainty for digital copyright in Canada. As the Supreme Court of Canada has stated in an extraordinary criticism of the Canadian government for its failure in this regard:

Parliament's response to the World Intellectual Property Organization's (WIPO) Copyright Treaty, 1996 ('WCT') and the Performances and Phonograms Treaty, 1996, remains to be seen. In the meantime, the courts must struggle to transpose a Copyright Act designed to implement the Berne Convention for the Protection of Literary and Artistic Works of 1886, as revised in Berlin in 1908, and subsequent piecemeal amendments, to the information age, and to technologies undreamt of by those early legislators.

Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers, 2004 SCC 45 (para. 43).

The result has been widespread trafficking in pirated intellectual property that has left the recording industry particularly vulnerable. The broad availability of pirate copies of recordings on the Internet and illegal digital copying are devastating sales. Prime Minister Paul Martin recognized the danger in the aftermath of the *BMG v. Doe* decision: "We are not going to let an industry that is so important to this country . . . be jeopardized." The time to act is now, and we urge the U.S. Government to press for immediate reform, and to initiate consultations in the WTO if immediate reform is not forthcoming.

Private copying exception: As amply demonstrated by the Federal Court of Canada and Federal Court of Appeal decisions referred to above, the Canadian Copyright Act's limited exception for the private copying of sound recordings requires clarification. The definition of private copying must be clarified to specify that it does not exempt Internet file sharing from copyright infringement and only applies to private individuals making copies for their own use of non-infringing sound recordings they legitimately own. In the digital era, anything broader than this definition transforms private copying into public copying, in violation of TRIPS. There is nothing private about the 2.6 billion sound recording files downloaded on the Internet each month without the consent of the artist or record company. Without specified limitations, the limited "private copying" exception for sound recordings is inappropriately transformed into an unlimited public copying license, with disastrous results for rights holders worldwide.

CROATIA

Piracy and enforcement deficiencies: The absence of sustained and consistent IPR enforcement activities in Croatia is a significant problem, particularly for the business software industry. The level of piracy experienced by the business software industry remains at an unacceptably high level. The Business Software Alliance (BSA) estimates that the 2003 business software piracy rate in Croatia was 59%. The recording and software industries report considerable delays with criminal raids as well as poor responses by the police to IPR infringement activity. However, after a special Cybercrime and IP Department was established within the Ministry of the Interior, the police appear to be placing greater emphasis on these cases and have shortened, but not eliminated, delays. Meaningful progress can be expected

only after Cybercrime and IP Departments are established in every police district throughout the country. All the copyright industries report that the police lack sufficient resources, in particular concerning the storage of seized pirate material, as well as the appropriate equipment, training, and expertise to effectively conduct their enforcement efforts, even while maintaining good relations with the industries. There are initiatives underway, including within the national CARDS program, to reorganize and create IPR specialists within the State Attorney's Office and the Judiciary.

BSA reports that the State Inspectorate (market police) did act on referrals from the industry in a timely manner in 2004, but that coordination between the State Inspectorate and police is minimal, resulting in many cases that have never been acted upon or never properly prosecuted under Croatian law. Nonetheless, enforcement is hampered by a lack of effective preliminary measures and expedient criminal procedures. Unfortunately, lengthy court proceedings are endemic to all of the copyright industries. Civil injunctions often take longer than six months to be issued, as compared to three days to three weeks, on average for the rest of Central Europe. One sign of progress in 2004 was the long-awaited enactment and application of the Customs Regulations on border enforcement; these regulations have shown initial positive results stemming the cross border flow of pirated products. The copyright industries request further transparency in the area of border enforcement, in particular, that Customs officials need to share information with rightholders about goods that cross the border.

CYPRUS

Piracy in the audiovisual sector: Cyprus suffers from a high level of pre-theatrical release piracy, with many pirate optical discs (VCDs, DVDs, and DVD-Rs) openly and widely available at kiosks, video clubs, and souvenir shops. Pirate discs are copied from parallel imported DVDs (also openly sold in video shops) or from pirate VCDs and DVDs imported from the Far East. There are about 150 souvenir shops where mostly tourists purchase pirate copies, 125 video clubs where pirate rentals and sales are taking place, and 250 kiosks working on a 24-hour basis which sell pirate products mostly to local residents. Many video clubs continue to obtain pirate copies of the latest titles, including titles that may not be legally rented or sold under the so-called "Windows" legislation (which protects a limited number of titles in theatrical release against video piracy from parallel imports). The retail shops supply the various markets, with a destructive effect on legitimate optical disc/cassette sales, and are creating a decline in box office admissions. In addition, pirate discs sold to tourists, who number around three million annually, are indirectly exported to their home countries (e.g., the UK, Scandinavian countries, Germany and Russia).

Record and music piracy: Counterfeit CD sound recordings are also sold openly in the many hundreds of small shops and kiosks around the island, which service the year-round tourist market. In addition, the recording industry has discovered that the small shops, sometimes found inside hotels, again aimed at meeting the needs of the resident tourists, are often found to be selling counterfeit discs. Each of these sell roughly 500 discs. In nearly all instances, the counterfeit discs are very poor quality CD-R home copies, with photocopied artwork, and presented in plastic sleeves. There is little or no evidence that the importation of discs from outside the island is a large problem in Cyprus. The recording industry has not yet encountered any pre-release CD-R discs in Cyprus.

Piracy in the entertainment software sector: The entertainment software industry reports that piracy of entertainment software products is growing worse, as pirated video games remain readily available at kiosks, shops catering to tourists, and in video rental outlets. Internet café piracy is a problem, as none of the 18 cafés on the island use licensed entertainment software. Modified or chipped video game consoles (i.e., with a circumvention device or mod-chip installed in the machine) are also prevalent in the market. The availability of pirated games for download from the Internet is damaging (and will continue to harm) the small PC games market that the industry has been able to develop in the country.

Enforcement and legislation: It appears that the Cypriot authorities have finally begun to respond to repeated requests to take action against the rampant piracy on the island. The first raids took place on December 29, 2004 when police and customs officers raided 17 shops in Limassol, seizing over 42,000 pirate DVDs, VCDs, videocassettes, music CDs, PlayStation® games, and two cars that were full of discs. Three shops were completely emptied of product. On January 5 2005, the Police and CYFACT raided ten kiosks and two shops in and around Nicosia and seized 1,561 DVDs, 12,666 CDs, 808 PlayStation games and 28 CD burners. On January 9, 2005 police and CYFACT raided an Indian-owned shop in Nicosia and seized around 4,300 DVDs and CDs, two CD burners and a DVD burner. On January 16, 2005 the police searched a shop and house in Larnaca and confiscated around 24,000 DVDs and CDs. Finally, on January 18, the Paphos Police searched four shops and seized 1,393 discs and 75 videocassettes. The recent raids follow a CYFACT seminar on December 16 for prosecutors, police officers, customs officers and Ministry of Commerce officials, and appear to indicate a change in attitude by the local authorities to the rampant pirate trade on the island. Despite the recent adoption of increased penalties for copyright offenses, and the creation of a small Anti-Piracy Squad at Police Headquarters, the local industry has been extremely frustrated at the almost total absence of police enforcement activity. While the recent raids are a very welcome breakthrough, they will have to be followed by the imposition of deterrent penalties and by a regular and consistent police response to the hundreds of complaints filed annually by CYFACT if the unacceptably high level of piracy on the island is to be reduced.

One entertainment software company reports that it has had some success with the customs authorities. In 2004, actions by customs authorities resulted in the seizures of cartridge-based video game products entering the country, thus somewhat reducing the levels of piracy for this platform. However, counterfeit video game cartridges continue to be widely available in the market, and it is hoped that the early efforts of the customs authorities will be sustained.

Finally, it appears that the Cyprus Copyright Law is applied by the judiciary in a way which raises difficult barriers to the enforcement of phonogram producers' rights. Piracy rates continue to increase in Cyprus, yet cumbersome burden-of-proof rules as to copyright ownership makes the initiation of legal proceedings against infringers very difficult. The Cyprus Copyright Law is currently interpreted in a way that requires rights owners to prove their ownership in each song fixed on a particular CD and does not provide for appropriate presumptions of ownership in favor of phonogram producers, nor does it allow sample testing of infringing goods. Thus, defendants are able to alternatively avoid suit altogether, limit their liability, or, at the very least, delay the legal proceedings against them. As required by the EU Enforcement Directive (adopted in May 2004), and in order to combat sound recording piracy, the recording industry urges the government of Cyprus to amend its laws to ease the burden of proving ownership, and to allow testing of samples of infringing goods.

CZECH REPUBLIC

Overview of key problems: Over the past years, there has not been a significant improvement in resolving key enforcement and legislative problems for many of the copyright industries in the Czech Republic. Music piracy remains at unacceptably high levels — one in two sound recordings sold is illegal. The main problems frustrating the legitimate market are optical media piracy, poor border enforcement, delays in criminal enforcement proceedings and lingering deficiencies in the copyright law. The once relatively strong market has been shattered due to massive CD-R piracy and a major increase in home burning. The recording industry's enforcement statistics indicate that over 90% of the seized pirated music discs were CD-Rs, which represents a significant increase since 2001. Over the past five years, the Czech legitimate music market has declined 35% in terms of value.

A serious problem in the Czech Republic is the overproduction of optical media (CDs, CD-Rs, and DVDs). The manufacturing capacity of the three operating CD plants with over 44 production lines is estimated to be as high as 154 million discs per year — significantly exceeding local demand. The GZ Digital Media plant has mastering capability and the Eximpo plant has CD-R and mastering capability. The GZ plant has obtained IRMA certification, and dialogue with the industries has been initiated with Eximpo and CDC on adoption of SID codes, though there remains scant evidence that these plants have any serious intention of adopting these codes.

The recording industry reports that there are cases being investigated involving pirated discs produced by known Czech plants. Additionally, cases are being investigated (in Germany, Switzerland, Poland and the U.S.), involving discs with large-scale music content in MP3 format produced by non-Czech plants but mastered in the Czech Republic. Recent visits to the Czech plants Eximpo and CDC by industry groups confirm that both the verification of the rights ownership of customers and the content of the orders are inadequate. In the absence of proper plant regulations, plant operators will have no incentive to adopt procedures to eliminate unauthorized reproduction. Furthermore, without any clear obligations for legally required checks and sanctions for violations, law enforcement agencies will have no basis for proactive investigations of plants. At present, the inverse is true — in the absence of regulations, plants have incentives to produce illegal material. The problem is further exacerbated by the absence of laws to monitor products leaving the plants (i.e., verification that the discs are as described and authorized); discs for both domestic and export use are of concern.

Illegal imports of pirate recordings from abroad continue, as well as pirate production of counterfeits and unlawful copies of sound recordings within the territory of the Czech Republic, particularly by Asian-based and other organized crime syndicates. These illegal activities are concentrated primarily at border areas in western and northern Bohemia. The most serious problems are in the district of Cheb, where police and Ministry of Interior officials, at least in theory, have been investigating illegal activities for years, without actually undertaking any meaningful enforcement. The illegal activity is open and notorious. Despite an increase nationwide in the number of investigations, there has been little political interest or central enforcement action to address the growing music piracy problem with closed cases. The criminal enforcement apparatus remains so slow (especially at the investigative, prosecutorial and judicial levels) that there is no deterrent effect.

The entertainment software industry reports that the level of piracy for its products continues to be problematic. Pirated console-based entertainment software products continue

to be shipped from Russia, sometimes through Austria and Germany, with distribution believed to be controlled by Russian organized crime syndicates. The level of piracy for counterfeit and pirated cartridge-based games increased in 2004, with Asia remaining the primary source of pirated material. Distribution of cartridge-based products is also controlled by organized criminal groups in the country. Internet café piracy continues to be a problem; only 20% of the 400 cafés have obtained licenses from ESA member companies. There is also concern that Internet piracy is growing.

On the positive side, the business software industry reports continuing cooperation from the government, especially with developing systems to monitor governmental compliance with its commitment to use only legal copies of software. There also continues to be a stream of fairly strong court decisions in software piracy cases.

Copyright law deficiencies: Legislative deficiencies remain. Despite numerous requests from the copyright industries, the Czech Government has not improved its current (2000 copyright law) insufficient protection of technological protection measures and rights management information. Furthermore, recently adopted amendments to the Copyright Law seriously undermined the ability of phonogram producers and other rightholders to exploit their rights.

Actions that the Czech government should take in 2005

- Demonstrate political will — via public announcements and internal government orders — to effectively implement and make the proper enforcement of IPR laws a priority;
- Have the Interior Ministry take swift actions against the omnipresent pirate activities, especially in the Cheb district;
- Adopt optical media regulations to control optical media production and distribution;
- Strengthen border enforcement to stop importation and transshipment of pirated goods, including optical media product;
- Improve the speed of criminal enforcement (at the police investigation, prosecutorial and judicial levels);
- Improve coordination between the various enforcement bodies (police, customs, prosecutors and the judiciary) so that concrete results in combating piracy is achieved as well as expand their expertise to act against Internet piracy;
- Amend the Copyright Law to effectively implement the WIPO Treaties, in particular, strengthen the provisions on technological protection measures and rights management information, in co-operation with copyright industries.

ESTONIA

Enforcement deficiencies: There has been little improvement in IPR enforcement activity in Estonia over the past several years. The piracy levels remain high and have negatively impacted the legitimate content industries. Weak border enforcement, Internet piracy, growing CD-R/DVD-R piracy, traditional and hand-to-hand piracy in the physical market, as well as a failure to implement effective civil search and seizure remedies are the major issues. The Estonian Government, in particular the Finance and Interior Ministries, must demonstrate proper political will to implement effective IPR enforcement in co-operation with rightholders' organizations.

Weak border enforcement remains a major problem, particularly along the eastern border with Russia. According to the copyright industries, in 2004, at least 70% of the pirated copies of music CDs in Estonia, came from Russia. The Estonian anti-piracy organization EOCP reports that smuggling of illegal pirate copies on the Eastern Estonian border continue. These reports were confirmed by the 2004 seizure by neighboring Finnish Customs officials of 13,000 pirate copies. While imports of pirated DVDs from Russia remain a threat to the motion picture industry, locally burned DVD-Rs are a growing source of pirated filmed entertainment in Estonia. Pirated business software also appears to originate primarily from neighboring countries, in particular Russia and Latvia. Despite the obvious presence of Russian-originated illegal product, Estonian Customs has not been doing its job. In 2003, BSA received only one request from Estonian Customs to assist with a seizure of suspect software products; in 2004, no requests were received. This despite BSA's participation in several training programs for Estonian Customs officials, in order to enable them to identify and seize counterfeit and illegally copied product pursuant to their *ex officio* powers.

The copyright industries urge the Estonian Government to mandate Estonian Customs to exercise their *ex officio* powers in order to stem the flow of counterfeit and pirate product into Estonia from Russia and Latvia.

The police have failed to take any effective actions against Internet piracy as well as against the illegal trade in the physical market. Those involved in Internet piracy operate with impunity, especially on FTP (file transfer protocol) servers and on popular illegal peer-to-peer services such as KaZaa and eDonkey. Rights holders contemplating legal action against Internet pirates face difficulties in identifying infringers due to restrictions in the Telecommunications Law. Local Internet Service Providers have refused to identify their users based on an IP address, as they (wrongly) consider this to be a "surveillance" which can only be undertaken in criminal proceedings.

The large-scale trade in pirate goods in the Tallinn harbor area targeted at Finnish tourists, as well as trade in Eastern Estonia, continues unabated, without any threat of police action. Pirates in Tallinn are charging as much as \$US13.00 for CD-Rs with pirate content. The police should focus on thoroughly investigating large-scale traders, uncovering warehouses and instigating cases against those controlling the pirate trade. Effective enforcement measures, such as well prepared raids, expeditious prosecutions, and deterrent sentencing, should be undertaken. The requirement for such action is clear: in Tartu, over 22,000 pressed CDs and DVDs were seized from a pirate distribution center; and in Tallinn, a pirate distribution center housing some 8,000 CDs and DVDs was discovered in 2004. There has been no evidence of basic communication and co-operation between the police and customs with respect to pirate goods, although this is an essential and basic requirement in any government program that is serious about tackling piracy.

BSA has been discussing the implementation of civil search and seizure procedures with the Government of Estonia for many years. Estonia is now close to ten years late in implementing a TRIPS-compliant civil search and seizure remedy. Without this remedy, private right holders are severely restricted in their ability to enforce and protect their own intellectual property rights. BSA urges the implementation of an effective civil search and seizure remedy without further delay

Finally, the Estonian government must direct its attention to optical disc plant activity in Estonia. In 2004, there was a significant amount of activity in connection with setting up OD replication operations in Estonia. While there has not yet been evidence or indication of

unauthorized production, the Estonian Government should start preparing optical disc regulations. The copyright industries' worldwide experience shows that the absence of such regulations, combined with a highly competitive market, can prove difficult for struggling OD plants wishing to comply with copyright laws, when competitors are generating revenue from illegal activities.

GEORGIA

Copyright and other legislative deficiencies: The rights of international phonogram producers are not fully protected in Georgia. Georgia has not even ratified the Geneva Phonograms Convention—an obligation that it undertook in an agreement with the United States more than a decade ago.

In a February 2002 review, the U.S. Trade Representative noted that, even after Georgian accession to the WTO (in 2000), “the U.S. government is concerned with key gaps in the legal regime...” and noted in particular “the lack of *ex officio* authority (the authority to undertake action without a rightholder’s complaint) for customs and criminal authorities, as well as the lack of civil *ex parte* search and seizure procedures conducted without notice to the alleged infringers.” These problems have still not been addressed. Under Georgian law, customs officials are authorized to seize suspected IP materials and hold them until a court renders a decision. However, one provision that significantly weakens the effectiveness of these provisions requires that an application be submitted by the rightholder before such action can commence. Now, three years after the report by the U.S. government, Georgia has still not corrected these deficiencies (and including complete ratification of the digital treaties that it acceded to) nor has it improved its enforcement regime.

National legislation must be amended to enhance effective anti-piracy activity. Currently, the Georgian Administrative Code does not provide liability for distribution or other illegal use of phonograms.

There were an estimated 5.5 million pirate copies of sound recordings sold last year, including 4.3 million cassettes and 1.2 million CDs. Piracy rates for the music sector at large was approximately 80%, and over 90% for American repertoire. Trade losses suffered by American industry amounted to US\$8 million and overall losses suffered by international rightholders exceeded US\$11.4 million.

Enforcement deficiencies: In 2004, upon initiation of rightholders’ complaints, the Georgian Police initiated two criminal cases under Article 189 of the Georgian Criminal Code. Police seized 160 CD-Rs and 684 cassettes containing phonograms of national and international repertoire. The investigation of these criminal cases is still ongoing; unfortunately, these are the only two reported cases.

There are no separate subdivisions or officers responsible for the fight against intellectual property infringements within the Georgian law enforcement agencies. This significantly impedes the establishment of an effective anti-piracy program.

GREECE

Business software: The widespread use of unlicensed software and distribution of low quality counterfeit CDs across the country show that there is still a lot to do to implement Greek intellectual property legislation in practice. Due to a lack of consistent enforcement activities, the level of piracy experienced by the business software industry remains at an unacceptably high level in both the private and public sectors, and even within the Public Administration. The Business Software Alliance (BSA) estimates that the 2003 business software piracy rate in Greece was 63%. This is well above the EU average of 37% and the highest of all countries in the enlarged EU region, including the traditionally more challenging countries in Eastern Europe.

Between 1999 and 2002 the increased efforts of the Greek National Police and SDOE (Greek Tax Police) in the field of software copyright protection resulted in an 8% decline in the Greek piracy rate. However, as both SDOE and the National Police have practically ceased their activities in the field of software copyright protection in the last two years, this positive downward trend has come to a halt. Meaningful progress can be expected only if the National Police and SDOE re-activate their enforcement activity and establish special departments/units within SDOE and the National Police to systematically fight intellectual property crimes.

In addition, the Greek government should lead by example stressing the importance of protecting intellectual property rights and legal software use within the Public Administration. By taking these positive steps and implementing policies that support legal software use, the government could raise significant awareness of the problem and help bring down the unacceptably high software piracy rate.

Music piracy: Music piracy in Greece is spinning out of control, and the government must take urgent action to address it. Similar to the situation in Spain, criminal syndicates use illegal immigrants (90% of which are estimated to be Nigerians). Due to the incredible tolerance of state services responsible for the application of immigration law and the scandalous impunity applied by the Greek justice system, the criminal networks are expanding day by day.

While the Greek police have confiscated a fair amount of pirate material, and have arrested some offenders, the only punishment the offenders get is their waste of time in the courtroom. The applied sentences are not the ones dictated by the law and a systematic consideration of attenuating circumstances is standard practice for judges. As a result, the imposed sentences are very low and never exceed a three year suspended sentence. Even the fines provided by the copyright law, which cannot be suspended, are not being imposed by the judges. In addition, the criminal records of the offenders are not updated, and the offenders appear to the court as first time offenders, while in a great number of cases they have already been sentenced several times.

Simply put, the state must do much more to address a large and growing problem. Piracy levels are well over 50%. The fiscal police must be directed to begin to address the piracy problem, judges must be educated to understand the gravity of these offenses and the need for deterrent punishments, and the copyright law needs to be updated. The Greek record industry submitted suggestions to the relevant ministry a number of years ago, but to date, nothing has been done.

Entertainment software piracy: Piracy levels for entertainment software products (including video games on optical disc and cartridge-based video games) are over 65%. Pirated cartridge-based games continue to be imported into the country from Asia, and CD-R burning has also increased. While the level of cooperation from the Customs authorities has generally been good, it is essential that border enforcement be further strengthened to adequately address continued importation of pirated entertainment software.

Audiovisual piracy: The main piracy problem for the film industry in Greece concerns pre-release titles, burned on CD-Rs and DVD-Rs in a vast number of small illegal duplication labs and advertised in magazines and newspapers, via e-mail or through Internet websites. Penalties continue to be too low for deterrence, and the time span between offense and punishment remains entirely too long. Judges and prosecutors adhere to the provisions of the Penal Code on sentencing rather than the provisions of the 1993 Copyright Law. This has resulted in the imposition of non-deterrent sentences and a general feeling in the minds of infringers that they can get away with minimal sanctions. Prosecutors, especially at the local level, are often reluctant to pursue intellectual property cases and have largely ignored Supreme Court circulars directing them to give intellectual property cases a high priority. These deficiencies in copyright enforcement have led EPOE (the local anti-piracy organization) to use the "All-Day Court" system established for urgent criminal matters. Unfortunately, this system can be invoked only where the defendant is taken into custody within 24 hours of the issuance of the complaint; otherwise the case is assigned to await its typical criminal court hearing.

Legal reform: Despite our enforcement concerns, we are very pleased with implementation of the Copyright Directive in Greece. Greece was the first of the EC member states to complete implementation of this Directive.

We encourage Greece to adopt an amendment in the copyright law to enable enforcement officials to impose administrative fines on all violators, in accordance with Act 2121/93 concerning Copyright and Neighbouring Rights. This would provide enforcement officials with additional tools against piracy, as long as such an amendment were crafted to provide an additional weapon and did not de-criminalize copyright offenses.

HONG KONG

While IIPA members remain pleased with the level of cooperation by Hong Kong Customs & Excise on a number of enforcement fronts, we are nonetheless concerned over some legislative and regulatory matters. IIPA members urge the U.S. government to monitor legislative developments in Hong Kong closely throughout the coming year and engage with the Hong Kong government to ensure that the Copyright Ordinance remains an effective tool in fighting all types of piracy, including digital theft. Though not recommending that Hong Kong be included on any of the Special 301 lists at this time, IIPA believes that the U.S. government should conduct an out-of-cycle review at an appropriate point to determine whether industry's concerns with current deficiencies in copyright legislation were adequately addressed in Hong Kong's consultative and legislative processes on copyright laws.

The Hong Kong government recently issued a consultation paper on the review of certain provisions of the Copyright Ordinance. The consultation paper's stated purpose is to facilitate review of crucial provisions involving the scope of end-user liability, fair use principles,

parallel import protection, evidentiary burdens in computer software cases, liability for circumvention of technological protection measures, and rental rights for films.

Notably absent from the consultation paper are important provisions relating to the protection and enforcement of intellectual property rights over the Internet. This is indicative of the somewhat piecemeal approach to legislative reform that the Hong Kong government has undertaken in recent years. The copyright industries have asked the government to conduct a comprehensive review and amendment of the Copyright Ordinance to meet the challenges in the digital age. Unfortunately, there has been no indication that this will be undertaken soon. Once again, IIPA urges the Hong Kong government to avoid attempting to deal separately with difficult subjects that are in fact interconnected in law and in practice. IIPA members are actively engaged in the consultation process and ask the U.S. government to monitor closely developments with respect to these vitally important topics.

The book publishing industry remains concerned with the Copyright (Suspension of Amendments) Ordinance 2001, which was recently extended to 31 July 2006, and which suspends criminal liability for those knowingly possessing an infringing copy of certain copyright-protected works in the course of a trade or business, with a view to committing an infringing act. This provision, which unnecessarily and unjustifiably differentiates between copyright-protected works according to medium or genre, reduces the level of protection afforded affected works, including many of those produced by the U.S. publishing industry. Such discrimination is wholly out of step with international norms, and with Hong Kong's obligations to employ effective and deterrent measures against copyright piracy. IIPA members remain actively engaged on this issue and strongly urge that this discriminatory provision be eliminated when next up for review.

In addition, entertainment software companies still face burdensome evidentiary requirements for prosecuting copyright offenses, causing an expenditure of excessive resources in order to bring a copyright infringement case. Under Hong Kong procedure, the copyright holder must provide Section 121 affirmations for every copyright infringement prosecution, which includes providing evidence of copyright ownership as well as attaching true copies of the video game titles that are the subject of the case. The situation remains unresolved due to the government's delay in using its powers under existing legislation to designate foreign copyright registries (including the U.S. Copyright Register) under Section 121. Recognizing U.S. copyright registration certificates and allowing their substitution for copies of the genuine article would greatly reduce the burden on copyright owners and expedite compliance with the affirmation requirements. It is hoped that the Hong Kong government will soon adopt the measures necessary to effect the recognition of foreign copyright registries.

The entertainment and business software industries appreciate the Hong Kong government's increased efforts against criminal syndicates involved in the distribution of pirated copyrighted products. The industries, however, remain concerned with Hong Kong's role as a transshipment point for counterfeit goods, including cartridge-based video games. Industry notes that according to statistics from U.S. Customs, in 2003 Hong Kong was the number two source of counterfeit goods reaching U.S. markets (behind only China). In 2004, there was an increase in seizures of counterfeit cartridge-based video game products from Hong Kong by the U.S. Bureau of Customs and Border Protection. Over 165,000 pirated Nintendo video game products were seized in the U.S. and several European countries in 2004. Despite the efforts of Nintendo of America (NOA) to provide exporter information on overseas seizures to Hong Kong Customs authorities, NOA has not received any information regarding legal action or investigations resulting from this information. It is hoped that the efforts that have been directed

toward addressing criminal syndicate involvement in optical disc piracy by the Hong Kong authorities will also be extended towards the problem of transshipment of pirated cartridge-based games through the territory.

The Hong Kong government has maintained good progress in eradicating optical disc piracy at the retail level and fighting illegal photocopying, and has recently begun to look at ways to address the growing problem of Internet piracy in the peer-to-peer environment. However, despite civil enforcement and IP education and awareness efforts by industry, business end user piracy remains a significant barrier to the development of the computer software industry in Hong Kong. End user piracy accounted for most of the US\$102 million in losses felt by the software industry in 2003, when Hong Kong experienced a software piracy rate of 52%. During the same time period, other markets in the region reduced their software piracy rates, putting Hong Kong well behind other advanced economies in the Asia Pacific region, including South Korea, Singapore, Japan, Taiwan, Australia and New Zealand.

The Hong Kong government has over time expressed its commitment to taking action against business end user piracy, consistent with its obligations under Article 61 of the TRIPS Agreement and its vision to build a knowledge-based economy. The government has also recently renewed its pledge to promote the development of cultural and creative industries, including the computer software industry. The government took steps to implement this policy in April 2001, when the Copyright Ordinance was amended to clarify that the knowing possession of infringing computer software for the purpose of or in connection with any trade or business is a criminal offense. Since the enactment of the law, the Customs & Excise Department have carried out a number of end user raids against those suspected of using software illegally. However, since that time only a few of these cases have made it to court and every contested case has ended in acquittal. Industry is concerned that the government has not invested sufficient resources to successfully investigate and prosecute business end user piracy cases and that, unless modified, the law remains inadequate to address the problem. The business software industry looks to the Hong Kong government to address the continuing challenge of end user piracy by achieving a meaningful reduction of this persistent form of piracy, through successful criminal enforcement and prosecution, and deterrent penalties.

Moreover, even though the current criminal law has proven to be ineffective in addressing the problem, the government recently consulted the public for views on proposed legislation that might significantly narrow the scope of protection for computer software. While the business software industry appreciates the government's stated commitment to tackle the business end user piracy problem, it urges the government to take concrete steps to make this commitment meaningful, including to: (1) take into account the apparent ineffectiveness of the current law when examining the need for refinements to facilitate the successful prosecution of business end user piracy cases in the short term; (2) refine the law to clarify the circumstances under which the failure to prove ownership of licenses can result in criminal sanctions; (3) refrain from rolling back copyright protection in software through amendments to existing legislation; (4) refrain from introducing a general fair use defense in copyright laws without first strengthening liability provisions; and (5) pursue sustained and effective criminal enforcement, prosecution, and IP education efforts.

IIPA members wish to emphasize that, though we have not asked for a specific ranking for Hong Kong at this juncture, we are deeply concerned about the approach Hong Kong is taking in its legislative reform process. The government's actions on the above-named matters have the potential for global significance. Hong Kong remains a vitally important market for the

U.S. copyright industries, and we therefore ask the U.S. government to pay close attention to upcoming developments in the territory.

ICELAND

Internet piracy, particularly through peer-to-peer (P2P) networks, is the biggest concern in Iceland. High levels of broadband penetration and other means of Internet access make the country fertile ground for online pirates. In 2004, following on leads from local anti-piracy associations, the police conducted raids at 12 locations against the operators of the file sharing network Direct Connect. It appears that the police were able to seize 11 terabytes of content during the raid. The hubs reportedly made available movies, music and computer games. The police are continuing their investigation and prosecutions may be initiated early this year.

KENYA

In spite of the Kenyan Government's acknowledgment that piracy is a problem, little progress has been made in rectifying the situation. The Kenya Copyright Board came into being in 2003, but has to date not been able to fulfill its mandate for various reasons, including funding. While IIPA members do not generally support adoption of banderole systems out of concerns that the banderoles themselves can be counterfeited, in this case, the failure of the government to implement the law with respect to banderoles has resulted in courts being unable to distinguish legitimate from illegitimate copies. This problem must be addressed. However, implementation of the banderole system is still waiting funding and the courts do not appear to be prepared to deal with the issue in the interim.

Pirated cassettes and CDs account for over 90% of the market and range toward 100% on other video and DVD media. Local repertoire is stolen and pirated in Uganda and Tanzania, the latter producing more sophisticated material. International repertoire comes in from Uganda and Pakistan. It is believed that two companies in Uganda and one in Zanzibar reproduce millions of pirated cassettes of both Kenyan and international artists and smuggle them back into Kenya — flooding the market.

There are four major problems currently preventing the fight against piracy that must be addressed by the Government of Kenya.

- Interpretation, implementation, and understanding of the copyright law pose enormous challenges to customs, police, and the judiciary.
 - Corruption results in seized goods disappearing from custody and court cases being drawn out and finally dismissed.
 - The Copyright Board has insufficient funds to establish a copyright office and has as such not budgeted for issues pertaining to enforcement of piracy.
 - There is an ongoing refusal of Kenyan authorities to try to address the problem using any other legislation, such as the Trade Descriptions Act, which is easier for the courts to understand and apply.
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LAO PEOPLE'S DEMOCRATIC REPUBLIC

While a Working Party was established for the WTO accession negotiations of the Lao People's Democratic Republic (PDR) in February 1998, the first meeting of the Working Party did not take place until October 2004. The country is not yet a member of the Berne Convention nor a signatory to the WIPO "Internet" treaties. As of 2001, there was as yet no law protecting copyright in the Lao PDR, though it appears that the country is in the process of preparing legislation for its accession to the Berne Convention.

The country's location gives rise to concerns regarding the potential migration of optical disc plants from neighboring Southeast Asian countries where illegal overproduction and export is a significant problem. The lack of an appropriate legal regime to address optical disc overproduction may become problematic should optical disc plants migrate to the country. In 1997, the U.S. and Lao governments concluded an Agreement on Trade Relations but the agreement was not signed until 2003. In late 2004, the U.S. Senate approved extending normal trade relations to Laos (the grant was part of the Miscellaneous Trade & Technical Corrections Act of 2004 signed by the President in December 2004) and brings into effect the 1997 trade agreement, which includes a chapter on intellectual property protection and enforcement. The Government of Laos should be encouraged to adopt the necessary measures to implement its obligations under the 1997 trade agreement as soon as possible.

MACEDONIA

Copyright enforcement is weak in Macedonia, according to all copyright industries active in the country. Markets for legitimate content barely exist and are heavily influenced by high piracy levels in all sectors. The overall music piracy level reaches as high as 95%, with pirate copies of international repertoire smuggled in from neighboring Eastern European countries. Domestic repertoire is targeted by the local CD-R pirates. The business software industry has seen some progress in the form of legal use of software by the government, education and awareness campaigns that are beginning to have initial impact. Additionally, the industry has seen some positive movement with respect to the acquisition of legal software by some businesses. Nonetheless, high levels of piracy in the business software sector still remain, most notably with respect to the widespread use of unlicensed software by commercial entities. Computers regularly are sold with illegal software pre-installed; but in recent months BSA reports that some system builders have been receptive to making commitments to adhere to the law and sell computers with legal software. Furthermore, police, prosecutors and customs officials lack the necessary equipment and expertise to conduct raids, perform investigations, and commence cases against copyright infringers. Also, the Copyright Inspectorate (which can take administrative enforcement actions) has failed to refer cases that merit criminal investigation to the police and prosecutors. Following recent Copyright Law amendments, the State Market Inspectorate is now competent to enforce the Copyright Law (as of January 2005); however, this extremely recent change remains untested in practice. Although the criminal and copyright laws permit the seizure and destruction of equipment used to make pirated goods, police and other enforcement bodies fail to do so in practice.

Piracy at the border is a particular concern, and customs authorities do not take appropriate action to prevent the shipment of infringing goods to and across Macedonia. Two particular problem areas are Macedonia's borders with Kosovo and Bulgaria. Another issue is excessive procedural delays. The business software industry reports that in general court

procedures take an inordinately long time. Also, it is rare for Macedonian courts to issue injunctions in criminal proceedings, even though there are legal provisions permitting such injunctions. When judgments are handed down by courts, they usually result only in minimal fines, rather than fines or prison sentences that constitute a deterrent to further infringement. However, in a sign of improvement, in 2004, the first two judgments were issued against persons who infringed software copyright.

At the end of 2004, Macedonia ratified the WIPO Performances and Phonograms Treaty (WPPT), which is due to enter into force on 20 March 2005. Unfortunately, the Macedonian Government decided to make two reservations following its earlier reservations to the 1961 Rome Convention. First, with respect to Article 3(3), phonograms published outside the territory of Macedonia will not be granted full national treatment. Furthermore, Macedonia took a reservation with respect to Article 15(3) of the WPPT, and as such, phonogram producers are unable to enjoy the broadcasting and communication to the public rights.

NIGERIA

Sound recording piracy is at a level of approximately 85% in Nigeria. Though a copyright law was enacted in 1992, there is little cooperation between government agencies, including law enforcement, toward implementation of the law.

There has been a proliferation of optical disc manufacturing plants in Nigeria, some of which have moved to Nigeria from Asia and operate to supply Central and Western Africa. In addition, pirates have completely overrun the book market, due in part to the government's decision in 2003 to cut all funding for universities' and libraries' purchases of these materials. The port of Lagos is inadequately policed against piracy and has become a major transshipment site for pirated product to enter Nigeria and nearby countries. The Nigerian government should increase enforcement—including the provision of increased resources, ensuring that cases go to trial and result in judgment. Additionally, the government should impose stiffer penalties, crack down on book piracy and provide adequately for legitimate purchase of academic materials. The government should likewise regulate the OD plants, and make the use of SID codes mandatory on all discs produced and sold in Nigeria.

The Nigerian National Copyright Administration (NCC) has responsibility in Nigeria for anti-piracy activities, and the Nigeria Customs Service, as the nation's gateway police, has a significant role to play in anti-piracy enforcement. There needs to be better coordination between these two enforcement entities.

SOUTH AFRICA

Illegal commercial photocopying plagues the U.S. publishing industry in South Africa. Photocopy shops in and around university campuses, as well as facilities being abused in libraries and similar on-campus venues, are decimating the market for educational publishers. Business publishers experience widespread copying of their books by commercial end-users. In addition, the business software industry reports high levels of piracy — particularly commercial end-user piracy. IIPA encourages the Department of Justice to take an active role in tackling these problems by ensuring that adequate monetary and human resources are dedicated to fighting piracy. IIPA also requests that copyright infringement cases be given proper attention in the court system. Finally, IIPA understands that the Government of South

Africa is considering legislative provisions liberalizing aspects of fair use. Existing copyright law already makes it difficult, time-consuming, and expensive for rightholders to enforce their intellectual property rights. Amendments addressing these concerns are long overdue. IIPA requests that the government allow sufficient time for review and comment by affected parties and industries before finalizing any copyright proposals.

The entertainment software, filmed entertainment, and sound recording industries are generally pleased with the level of cooperation received from the Customs authorities and the police. However, the sound recording industry is concerned that South African Customs (SARS) does not detain contraband copyrighted product in transit and urges SARS to do so. Over the last year, there has been an increase in the level of seizures of pirated products at the border, as well as through raids conducted by the police in the optical disc market. Unfortunately, cases continue to languish in the courts where delay is common, resulting in considerable costs to the rightholder. The government must be encouraged to address the problem of chronic delay in the courts.

SPAIN

Continuing high levels of piracy in Spain are adversely affecting the music, entertainment software and filmed entertainment sectors in that country. Factory-produced pirate music CD products as well locally burned CD-Rs and DVD-Rs dominate the street market. Internet piracy is also a major problem, exacerbated by the growth and increased penetration of broadband. Organized crime syndicates have maintained their active role in the production and distribution of pirated materials. Despite good laws, piracy continues to flourish, and there is a great need for improvements in enforcement, and in particular in the courts, which are generally slow, and suffer from the uneven application and lack of understanding of the relevant laws.

Street piracy and organized crime: Piracy in Spain exhibits some characteristics that arise frequently in connection with OD piracy — namely the connection with illegal immigration and tobacco smuggling and other organized crime syndicates. These businesses are in the process of evolving, and much of the illegal business now hides behind the “legal” import of blank carriers and/or machinery used for piracy (of illegal origin most of the time) and their further distribution and sale.

Chinese syndicates are increasingly dominating the pirate trade in Spain. The Chinese syndicates are much better organized and financed than their predecessors (primarily from northern and sub-Saharan Africa), and have imposed a price policy (2€/CD), with an aggressive distribution through the use of itinerant sellers in streets and entertainment premises.

Police actions against “mochileros,” who sell out of backpacks, are more difficult than actions against the street “manteros,” who sell from blankets that are relatively fixed in location, and maintain more product. In 2004, the number of street vendors selling pirate optical disc products has continued to grow. There are an estimated 8,000 to 10,000 street vendors, including at least 5,000 mochileros and 3,500 manteros. About half of all street sellers specialize in audiovisual products, usually DVD-Rs of films in recent theatrical release (many titles are available within one week after theatrical release).

These Chinese networks are not only involved in recording CD-R and DVD-R formats, but also directly import pirate CDs manufactured in Taiwanese and Chinese plants. Product consists primarily of international releases, although albums of some important national artists have also been detected.

Many of these street sellers are illegal immigrants controlled by the Chinese gangs. Their illegal status creates additional judicial difficulties because they cannot be automatically deported and can take advantage of procedural delays to disappear, requiring rightholders to file numerous legal procedures with no decisions. (A decision cannot be made if the defendant cannot be located.) This highlights the need to address the organized production sources of the pirate product, not only its distribution. Organized gangs maintain labs and distribution centers in Madrid, Barcelona, Grenada, and possibly in Girona, Tarragona, and Alicante. Although the explosion in the growth of OD piracy began in mid-2002 in large urban areas, it has also expanded into the suburbs and other remote regions as supply has increased dramatically.

The following steps would be useful to effectively address the growing street vendor piracy problem: stronger criminal penalties; increased *ex officio* police actions against street sales; more actions against labs supplying street vendors; increased police coordination, and the inclusion of IP violations in the list of cases that qualify for "fast hearings."

Piracy in the music sector: Estimated trade losses for the music industry in Spain in 2004 were \$90 million—not counting losses associated with Internet piracy for which we offer no specific dollar amount but which undoubtedly exceed those connected to physical piracy. Despite increased enforcement activities, music piracy exceeds 24% (in some cities like Madrid, Seville, Granada or Murcia this percentage has reached between 30% and 40%), probably the highest rate of any developed country in the world, and losses continue to mount.

The situation for the recording industry in Spain is particularly dire, and pirate recordings are sold in the most open and notorious manner. This grave situation has been widely reported in the national media, and the pirates grow bolder and more organized each day. Although the Spanish government has increased its activities, these have not resulted in any reduction in piracy, and the music industry finds itself in a moment of true crisis. Legitimate music stores are closing because of inability to compete with the pirates. It is essential that the government increase its commitment to the fight against piracy, and in particular devote attention to problems in the courts. At present, judicial processes are very slow and cumbersome, and many judges lack an understanding of the gravity of the issues presented, resulting in the inadequate and uneven application of the law.

Piracy in the entertainment software sector: The entertainment software industry reports that there were more police actions against retail outlets selling counterfeit and pirated goods in 2004. However, notwithstanding the increase in police activity, pirated video game products remain readily available in the market (particularly in Barcelona, Valencia, and the Canary Islands). The Customs authorities must step up enforcement activity so as to stem the flood of pirated products being imported into the country.

Piracy in the audiovisual sector: For the audiovisual industry, which estimates an annual loss of over US\$40 million because of piracy, street sales of pirate optical discs have become the most threatening piracy problem. About half of all street sellers specialize in audiovisual products, usually DVD-Rs of films in recent theatrical release. Camcording is becoming a major

concern due to the fact that it is increasingly the favored source for street pirate product. In particular, sound recordings made in local theaters are frequently combined with “camcorded” video obtained in other countries and made available on the Internet. As such, anti-camcording legislation, which would specifically address sound recording as an independent activity, with jail sentences, preferably up to a year or longer for a first offense, and a higher penalty for any subsequent offense, would be useful to help address this problem.

Spanish government actions: Several ministries are directly involved in anti-piracy efforts. The Ministry most responsible for setting enforcement priorities, the Ministry of Justice, is also directly charged with implementing the EC Copyright and Enforcement Directives. The Ministry of Interior coordinates actions of the Guardia Civil and Police, crucial for action against street sales. The Ministry of Culture is seeking to establish overall coordination between the different ministries to protect intellectual property.

Of particular interest is a draft “Integral Plan” to protect intellectual property released by the Ministry of Culture for comment in late December 2004. This “Integral Plan” needs a much stronger enforcement component to accompany its primary analysis and awareness focus. The government, particularly the Ministry of Justice, has agreed to seek enforcement specifics for the plan and has set up working meetings with industry for that purpose. A final plan, with analysis/awareness, legislation and enforcement elements, should be finalized early in the second quarter of 2005.

The Ministry of the Interior has undertaken a significant amount of police work against street sales, and in recent meetings with the Minister of Justice indicated that it is now much more open to taking effective action.

FAP (the local anti-piracy organization of the film industry) has presented to the Ministries of Culture and Justice a response to the draft “Integral Plan,” supporting it and also requesting that it include more specific enforcement goals (i.e., a specific reference to police action, something the plan recognizes but generally dismisses as insufficient), implementation of the Copyright and Enforcement Directives, an effective implementation of the proposed “Internet Law” which should establish liability for ISPs, the development of rapid trial proceedings for street sales cases—specifically reducing the forensic burden currently imposed on rightholders—and government participation or diffusion on government media of the current industry led anti-piracy public awareness campaigns. Effective implementation of the Enforcement Directive is especially important, as it should facilitate enforcement efforts particularly in the digital environment. All these efforts should be monitored closely to ensure an outcome that facilitates enforcement efforts.

Despite positive changes in the Criminal Code and Criminal Procedures Code that took effect in October 2004, the Spanish government has failed to implement the EU Copyright Directive and has improperly implemented the E-Commerce Directive. (The Spanish draft creates a limitation of liability for Internet Service Providers [ISPs] that goes beyond that permitted by the Directive). The new commission to be established by the Ministry of Culture wants to set a goal of approximately one to one and a half years from now to analyze and propose legislative changes. This is simply too long.

Enforcement against Internet piracy is a big challenge: Rightholders contemplating legal action against Internet pirates in Spain face difficulties in identifying infringers due to restrictions imposed by Spanish data protection laws. Rightholders cannot generally obtain

from ISPs, via a civil procedure, the identity of an infringing end user upon communication to the ISP of an IP address. Such information may, however, be obtained via a criminal prosecution.

The Internet is still used for hard goods distribution, as it gives pirates an additional layer of protection because judges have to authorize special warrants allowing police to search their homes. Moreover, Internet downloading is growing rapidly, especially via peer-to-peer (P2P) systems and Internet Relay Chat (IRC) channels. As with street sales of discs, P2P downloading piracy appears to be growing exponentially.

One reason for these difficulties with Internet enforcement in large part lies with the Spanish government's failure to implement the EU Copyright Directive by the December 22, 2002 deadline.¹ The draft Spanish implementation legislation, proposed in December is expected to improve this subject. The Parliament is not expected to pass any legislation to implement this Directive until March 2005. Furthermore, the draft Spanish legislation on the E-Commerce Directive² creates a limitation of liability for Internet Service Providers (ISPs) that goes beyond that permitted by that Directive. Local rights holders are working very hard to seek improvements to these two bills, and IIPA members are extremely interested in ensuring that the bills are adopted in ways that are consistent with the WCT and WPPT—in particular with those Treaties' obligation to: “ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement covered by this Treaty [including of course the right of making available], including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.”

IIPA urges the U.S. government to monitor closely the legal and enforcement situation in Spain. The Spanish government has taken impressive measures to address ubiquitous street piracy, but these measures have not yet proven to be fully effective and need to be further strengthened. The record industry in Spain finds itself in a struggle for survival. In addition, the U.S. government should work with the Government of Spain to ensure that legislation is adopted that implements the requirements of TRIPS and the WIPO Treaties to provide an effective deterrent to online offenses.

SWITZERLAND

The Federal Copyright Act of 9 October 1992 as amended is currently undergoing further revision in order to implement the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) into Swiss law. IIPA is concerned with the way in which the two treaties are being implemented in the country. The Swiss Federal Institute for Intellectual Property continues to delay the implementation of the WIPO Copyright Treaties. In September 2004 a draft implementation was released, but is problematic in several respects: it has an overly broad private copying exception (indeed the current exception is problematic and certain groups argue that downloading infringing copies of copyright works from peer-to-peer (P2P) networks is legal in Switzerland); inadequate protection of technological measures (including over-broad personal use exemptions); and burdens on rightholders employing technological measures (including labeling obligations).

¹ The EC Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (the “EU Copyright Directive”) came into force on June 22, 2001, and was to have been implemented by Member States by December 22, 2002.

² The EC Directive 2000/31/EC on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (the “EU E-Commerce Directive”) came into force on June 8, 2000, and was to have been implemented by Member States by January 17, 2002.

Furthermore, the Swiss government should seek to make the use of P2P networks for copyright infringement more difficult. SAFE (the Swiss Anti-Piracy Federation) continues to investigate portal sites, which are generally hosted by foreign providers. In March 2004, police (cooperating with SAFE and the German Anti-Piracy organization [GVU]) raided the home of the Swiss creator of an eDonkey portal offering an extensive number of links to movies, cartoons, PC and console games, software, books and pornography (averaging 220,000 visitors per day). This individual will be prosecuted for copyright offenses, the first such prosecution against the creator of a portal for a P2P network in Switzerland.

VIETNAM

Vietnam is still in the midst of its WTO accession negotiations, with the stated goal of achieving membership in 2005. Draft copyright legislation has been released and review of the legislation is underway. The U.S. government must ensure that this legislation provides the high standards of intellectual property protection required under the U.S.-Vietnam Bilateral Trade Agreement and the TRIPS Agreement, if Vietnam is to accede to the WTO. Vietnam should also fully implement the WIPO "Internet" Treaties.

Vietnam is a country of concern given the possible migration to its territory of optical disc and cartridge manufacturing facilities engaged in illegal activities. IIPA reports that there are four optical disc plants located in the country, comprising twelve production lines, capable of producing up to 42 million discs per year. This massive production capacity makes the adoption of optical disc regulations rather pressing. Entertainment software companies have found Vietnamese-sourced pirate products in several Asian countries, Canada, the Czech Republic, and Poland. It is believed that organized criminal syndicates are also involved in piracy operations. CD-burning operations also exist in the country, with pirated PC games being sourced from cracked versions made available through the Internet. Piracy is also widespread in Internet cafés.

Vietnam also suffers from blatant and widespread book piracy, in the form of illegal reprints and photocopies. These are distributed in a variety of venues, from government-owned bookshops to roadside stalls. The English language teaching market is among the hardest hit. More than 90% of this market (private-sector education and universities) is supplied by unauthorized reprints and adaptations. These are published by entrepreneurs using the licenses of state-sector publishers, such as those of the Ministry of Youth and the General Publishing House of Ho Chi Minh City, and distributed through the mainstream state bookshops. Copies of such books also flow to Cambodia, supplying a similar proportion of the market there. Government publishing houses could help reduce piracy in the English language teaching sector by ensuring that they lend their names and ISBN numbers only to works for which they have documented proof of legitimacy (mainstream bookshops require this information in order to make inventory decisions).

Software piracy is rampant in Vietnam. In fact, the software piracy rate in Vietnam in 2003 was 92%, putting Vietnam at the top of the chart with China. By comparison, the average software piracy rate in Asia in 2003 was 53% and the average worldwide piracy rate was 36%. Vietnam does not currently have adequate legal tools to fight software piracy effectively in its different forms, the most damaging of which is corporate end user piracy. Moreover, Vietnam has done little to use what administrative authority it does have to fight against software piracy. BSA provided some enforcement training to authorities in 2004 and will continue this training in 2005. Necessary legislative changes include the introduction of criminal penalties against corporate end user piracy and the introduction of statutory damages.

We call upon Vietnam to significantly improve its enforcement against copyright piracy.