INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®

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Submitted via regulations.gov
Mr. Stanford McCoy
Assistant U.S. Trade Representative
for Intellectual Property and Innovation
Office of the U.S. Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508

Re: Special 301: Written Submission Regarding the Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment ("Special 301"), and Request to Testify at the Public Hearing, 75 Fed. Reg. 82424 (December 30, 2010)

Dear Mr. McCoy:

The International Intellectual Property Alliance (IIPA) submits this response to the Federal Register notice which invites "written submissions from the public concerning foreign countries' acts, policies or practices that are relevant to the decision whether a particular trading partner should be identified under Section 182 of the Trade Act [of 1974]." That section of the Trade Act is more commonly referred to as "Special 301," and involves the process, led by the Office of the U.S. Trade Representative, of identifying countries that deny adequate and effective protection of intellectual property rights or deny fair and equitable market access to U.S. persons who rely on intellectual property protection (19 U.S.C. §2242). IIPA has participated in every Special 301 cycle since the 1988 Trade Act created this process, providing public comments on acts, practices and policies regarding copyright law, piracy, enforcement and market access in selected foreign countries. In this year's filing, including this Submission Letter and appendices, IIPA reports on 40 countries noted in the chart in Section D of this Submission Letter, including 33 which we recommend be ranked on the Special 301 Priority Watch List or Watch List, or monitored under Section 306 of the Trade Act. IIPA has also recommended that one Out-of-Cycle Review (OCR) be conducted later in 2011. IIPA will also request to testify at the March 2, 2011 public hearing on Special 301 by separate cover.

A. THE IIPA'S INTEREST IN THIS FILING AND THE SPECIAL 301 PROCESS

The International Intellectual Property Alliance (IIPA) is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials. IIPA comprises seven trade associations, each representing a significant segment of the U.S. copyright community. These member associations represent over 1,900 U.S. companies producing and distributing materials protected by copyright laws throughout the world — business software (operating systems, Internet enabling software, browsers, search engines, office productivity software, database management software, green technology enabling software, security software and mobile technologies); entertainment software (interactive games for video game consoles, handheld devices, personal computers, and the Internet); theatrical films, television programs, home videos and digital representations of audiovisual works; musical compositions, recorded music; and textbooks, trade books, reference and professional publications and journals, in both print and electronic media.

In July 2009, IIPA released the latest update of our economic report, *Copyright Industries in the U.S. Economy: The 2003-2007 Report,* prepared by Stephen Siwek of Economists Inc. This report details the economic impact and contributions of U.S. copyright industries to U.S. Gross Domestic Product, employment, and trade. The "core" copyright-based industries in the U.S. continue to be major contributors to the U.S. economy, accounting for an estimated $889.1 billion or 6.44% of the U.S. gross domestic product (GDP) in 2007, 22.74% of the growth achieved in 2006-2007 for the U.S. economy as a whole, and 5.6 million workers in 2007 (4.05% of U.S. workers) in 2007.[1] The report notes the high average annual compensation – relative to other American workers – for a worker in the core copyright industries, which was $73,554 in 2007. Finally, estimated 2007 foreign sales and exports of the core copyright industries increased to at least $126 billion, leading other major industry sectors.[2] These numbers confirm the late Jack Valenti's view of copyright and creativity as "the jewel in the U.S. trade crown." Other countries' studies similarly demonstrate the significant linkage between copyright protection and economic development.[3]

What these studies do not reveal are the massive costs (and thus lost potential) due to piracy and other distortions to the marketplace, such as market access barriers, investment barriers, and discriminatory treatment to U.S. firms. In the physical world, content industries contend with those who, in the absence of good protection and enforcement, engage in piracy as a high-profit, low risk enterprise. Unfortunately today, with Internet and mobile piracy, businesses built on copyright are facing incredible threats, as legitimate online business models must compete with the massive proliferation of illegal services that are unencumbered by costs associated with the creation of copyright works or rights clearances. Measuring the costs of piracy and other barriers differs by industry sector. For example, according to the most recent study commissioned by the BSA, preliminary data indicates the commercial value of unlicensed U.S. software in 2010 exceeded $32 billion per year globally (while the total value of unlicensed software was $55 billion including non-U.S. firms).[4] Meanwhile, an independent study just released by BASCAP (Frontier Economics), *Estimating the Global Economic and Social Impacts of Counterfeiting and Piracy* (February 2011),[5] estimates the value of digitally pirated music, movies and software (not losses) at $30-75 billion in 2010 and, at $80-240 billion by 2015. The scope of online piracy is so immense that a January 2011 study by Envisional concluded that an estimated 23.76% of all Internet traffic worldwide relates to the transmission of infringing content.[6]

B. THE IIPA 2011 SPECIAL 301 SUBMISSION

The IIPA 2011 Special 301 Submission provides information aimed to assist the U.S. government define concrete plans of action for the year ahead and, longer-term, to improve copyright protection, reduce global piracy

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[1] *See* Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2003-2007 Report*, 2009 (on file with IIPA). The "core" copyright industries are those that create copyrighted materials as their primary product. The "total" copyright industries include the "core" industries plus those that, under conservative assumptions, distribute such products or other products that depend wholly or principally on copyrighted materials.

[2] For some industries, foreign sales approach or exceed 50 percent of all revenues generated worldwide. For example, In 2007, the Motion Picture Association reported that its all-media sales in non-U.S. markets reached $20.4 billion.

[3] In 2003, the World Intellectual Property Organization (WIPO) published a guidebook on the economic parameters to develop such studies entitled *Guide on Surveying the Economic Contribution of the Copyright-Based Industries* (WIPO Publication No. 893) (2003), at http://www.wipo.int/copyright/en/publications/pdf/copyright_pub_893.pdf. Studies have been done in Australia (2007), Bulgaria (2008), Canada (2006), Colombia (2010), Croatia (2010), Hungary (2006), Jamaica (2008), Kenya, Korea, Latvia (2006), Lebanon (2008), Malaysia (2007), Mexico (2008), the Netherlands (2008), Panama, People's Republic of China, Peru, the Philippines (2008), Romania (2010), Russia (2010), Singapore (2006), Slovenia, and Ukraine (2010).

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

[5] Frontier Economics, *Estimating the Global Economic and Social Impacts of Counterfeiting and Piracy: A Report Commissioned by Business Action to Stop Counterfeiting and Piracy (BASCAP)*, February 2011, at http://www.iccwbo.org/uploadedFiles/BASCAP/Pages/Global%20Impacts%20-%20Exec.pdf. The report builds on a previous OECD study (*The Economic Impact of Counterfeiting and Piracy (2008)*) that looked at the value of international trade of counterfeit products, updates OECD's assumptions and examines categories of impact not quantified in the original OECD report, namely, the value of domestically produced and consumed counterfeits, the effects of digital piracy and broader economy-wide effects. The report estimates the global economic value of counterfeiting and piracy to be $650 billion and estimates that the figure will escalate to $1.8 trillion by 2015.

[6] Envisional, *Technical Report: An Estimate of Infringing Use of the Internet*, January 2011 (on file with IIPA).

levels, and open markets to U.S. copyright content in the identified countries. Section C of this Submission Letter presents a discussion of "Copyright Industries' Initiatives and Challenges for 2011." Section D provides the IIPA recommendations for the 2011 Special 301 lists. Appendix A includes all the country surveys.[7] Appendix B describes IIPA members' methodologies for calculating estimated trade losses and piracy levels. Appendix C provides a chart of countries/territories' placement on Special 301 lists by USTR since 1989.[8] Appendix D contains the Special 301 histories of countries/territories on which IIPA has reported, whether recommended for placement on a list this year, deserving special mention, or appearing on past lists.

C. COPYRIGHT INDUSTRIES' INITIATIVES OR CHALLENGES FOR 2011: REDUCE COPYRIGHT PIRACY, REMOVE MARKET ACCESS BARRIERS, STRENGTHEN LAWS

This Submission and its Appendices aim to define and seek implementation of concrete solutions to significant commercial hurdles faced by the content industries of the United States, including business software, motion pictures, entertainment software, recorded music, and book publishing. The following copyright industries' initiatives or challenges all aim to reduce piracy, open markets to legitimate U.S. copyright business, and ensure adequate legal structures are in place to lower and maintain low piracy levels into the future.

The Need for Deterrent Enforcement Responses to Copyright Piracy

Copyright piracy as we know it today increasingly occurs in ways more sophisticated than the mere duplication and sale of content on physical media. Piracy also includes the unauthorized use of software within businesses (or by governments); the illegal copying, uploading, downloading, making available, communicating, or streaming of copyright materials on the Internet (including at Internet cafés) or mobile networks; the illegal camcording of movies from theater screenings; the illegal photocopying of books or pirate offset printing of popular titles; the illegal public performance or broadcast of audiovisual works or sound recordings; hard-disk loading of software onto computers without authorization or license; and bootlegging, i.e., the unauthorized fixing of a live performance of music as a sound recording, for further duplication and sale. Related to piracy are activities such as the development, manufacture and distribution of circumvention devices used to access and make copies of copyright materials protected by technological protection measures; the trafficking in counterfeit software packaging, labels, holograms, certificates of authenticity, or documentation; and the unauthorized decryption of pay TV signals, as well as other activities facilitating unlawful use of copyright materials.

Too often, whether due to lack of political will or under-developed rule of law, countries fail to address these piracy phenomena effectively. The overarching objective for the copyright industries therefore remains to secure in countries around the world effective legal frameworks capable of providing deterrent enforcement against copyright piracy. Examples of concrete acts that can make a commercial difference (more are described in the specific sections below) include: 1) dedicating enforcement resources commensurate with the scale of the piracy problem, to provide for "effective action" and "remedies that constitute a deterrent"[9] to infringement as the minimum required by the TRIPS Agreement, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), through

[7] Country surveys were prepared by counsel to the IIPA, Michael Schlesinger, Eric H. Smith, Steven Metalitz, Eric J. Schwartz, and Amanda Denton, and are based on information furnished by IIPA's seven member associations. We thank Kristen Schumacher and Pamela Burchette for their contribution in preparing, producing and distributing this submission. The country reports contain information which should not be construed as providing legal advice.

[8] Fifteen of these countries/territories have appeared on a Special 301 list each year since 1989, and are recommended by IIPA to appear there again. A 1994 amendment to Section 182 of the Trade Act, dealing with identification of "priority foreign countries," provides that the U.S. Trade Representative must take into account "the history of intellectual property laws and practices in the foreign country, whether the country has been identified as a priority foreign country previously, and U.S. efforts to obtain adequate and effective intellectual property protection in that country." Uruguay Round Agreements Act Statement of Administrative Action, *reprinted in* H.R. Doc. No. 103-316, vol. I, at 362 (1994). Under these criteria, these 15 countries/territories named by IIPA are particularly vulnerable, having failed to correct their piracy and/or market access problems during the 22 years that Special 301 has been in existence.

[9] For effective deterrence, prosecutors and judges (or, where applicable, administrative agencies) should impose penalties that remove the monetary incentives that drive the pirate trade. Small fines do not deter pirates who stand to gain hundreds of thousands to millions of dollars. Deterrence requires substantial prison sentences in these cases. Major pirates often manipulate the legal system to evade conviction, or suffer only small monetary fines that utterly fail to discourage them from continuing in their illegal business or others from following their example. Recidivism is endemic in many countries.

civil, administrative, and criminal action, and effective adjudication in the courts;[10] 2) training and empowering enforcement authorities to investigate and prosecute copyright offenses; 3) updating laws and enforcement tools to meet the current piracy challenges, as the nature of these challenges changes, including recognizing the connection between piracy and organized crime;[11] 4) issuing orders or directives to government agencies, entities, contractors, and educational institutions to use only legal software, legal copies of textbooks and other educational materials, and other copyright materials, both because these entities are a large market for such works and because the government's own respect for copyright will set an important example for the private sector; 5) directing government agencies and educational institutions to take appropriate steps to ensure that their networks or computers are not used for infringing purposes; 6) ratifying and fully implementing the WCT and the WPPT; 7) encouraging cooperation by Internet service providers with all content owners, including notice and takedown systems and effective and fair mechanisms to deal with repeat infringers; and 8) enacting and enforcing measures to make it illegal to use or attempt to use an audiovisual recording device to make or transmit a copy of a motion picture.

Internet and Mobile Piracy

While developments on the Internet and mobile networks have transformed the way we work, learn and play, and have opened up opportunities for faster, more efficient and more cost-effective distribution of information, products and services across the globe, they have also, unfortunately, resulted in massive infringement of music, movies, games, software, published materials and other copyright materials. The January 2011 study by Envisional concluded that an astonishing 23.76% of all worldwide Internet traffic is copyright infringing, broken down by the following technologies: 11.4% of all Internet traffic was illegal BitTorrent downloading; 5.1% of all Internet traffic was illegal cyberlocker downloading; 1.4% of all Internet traffic was illegal video streaming; and 5.8% of all Internet traffic was illegal P2P filesharing or illegal downloads over other filesharing services or sites.[12]

Each industry sector has its own unique experience with the online piracy phenomena most harmful to them, although many share commonalities, particularly as the increase in broadband penetration makes faster and larger downloads and access to copyright materials possible. Online and mobile piracy are by far the greatest priority issues for the music industry, which faces a global Internet piracy problem estimated at 95%. Other industry sectors also view Internet-based infringement as one of the greatest threats to their continued viability. The Entertainment Software Association again undertook a study in 2010 to measure the scope of online piracy through popular P2P networks. Results were compiled across major P2P protocols and involved activity on approximately 230 leading member titles. During 2010, ESA vendors detected more than 144 million connections by peers participating in the unauthorized filesharing of select ESA member titles on public P2P networks through ISPs in more than 200 countries and territories globally. The top five countries in terms of overall detections (Italy, China, Spain, Brazil and France) accounted for more than 78 million detections (54% of the global total) – more than 14-times the number of detections in the United States. It must be stressed that although alarming, these figures provide a snapshot of only one facet of the online piracy

[10] In many countries, specialized IP courts have been established, in addition to IP- or cybercrime-intensive investigative units with police and prosecutors. In the most successful examples, such specialized courts or divisions are starting to make a difference in their localities, since they receive specialized training and have a deeper understanding of the nature and harm posed by piracy and IP crime in general.

[11] Piracy has been taken over in many countries by organized crime syndicates; this includes both physical and online piracy phenomena. These highly-organized criminal syndicates, linked across national boundaries, control large amounts of capital, and exploit complex distribution networks. IIPA has long provided examples of the linkages between piracy and violent or organized crime in previous Submissions. A March 2009 study explored the linkages between organized crime and film piracy detailing 14 case studies of film piracy, providing compelling evidence of a broad, geographically dispersed connection between piracy and organized crime. As well as documenting cases in North America and Europe, the report outlines the involvement of organized crime with film piracy in South America, Russia and many parts of Asia. *See* Gregory F. Treverton et al, *Film Piracy, Organized Crime & Motion Picture Piracy*, RAND Corporation, March 2009, at http://www.rand.org/pubs/monographs/2009/RAND_MG742.pdf. That study once again showed that the mark-up for DVD piracy (a relatively low-risk activity) is much higher than that for cocaine and heroine trafficking. The private sector does not possess the tools, nor usually the authority within countries, to investigate and fight organized crime. In addition, such organized groups or other commercial pirates can become violent, and company representatives and counsel have in some countries experienced threats on their lives, physical intimidation, or attacks leading to injury when doing their jobs to investigate piracy, and this has prevented enforcement activity by the private sector in many instances. Therefore, governments must step up to this challenge, including encouraging countries with existing laws, like Hong Kong's Organized and Serious Crimes Ordinance and the United Kingdom's Serious Crimes Act 2007, and those having other procedures that can be employed against organized crime, to bring the remedies within them to bear against syndicate operations involved in piracy, including, *inter alia*, disclosure of information being used to commit piracy and seizure or freezing of assets. As early as 2000, INTERPOL has recognized the need for national and international enforcement authorities to coordinate their efforts and cooperate with IP right holders to fight IP crimes including piracy.

[12] *See supra* note 6.

problem afflicting the entertainment software industry. Indeed, these figures do not account for any downloads made of infringing hosted content, such as infringing games found on "one-click" hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

The following is a non-exhaustive but illustrative list of examples of forms of online piracy, including some notorious sites implicated in piracy:[13]

- Baidu is an example of a Chinese site offering a "deeplinking" service that collects links to infringing content and provides users the ability to bypass the homepage of another site, instead linking to that content directly. In the case of Baidu, the deeplinks lead to infringing music files for streaming and downloading. It is estimated that almost 50% of all illegal music downloads in China takes place through Baidu.[14]

- P2P protocols like BitTorrent, eDonkey, Gnutella, and FastTrack, and P2P applications like eMule, Kazaa, BearShare, and Limewire, have been used as popular means of distributing infringing content, including music, audiovisual materials, business and entertainment software, and digitized books and journals.[15] Notorious P2P services or sites implicated in infringement include Limewire,[16] Xunlei, verycd.com,[17] BTPig (and progeny including Subpig), Kugou or Kugoo (China), and Chilewarez (now Chilecomparte) (Chile).

- BitTorrent index sites like Torrentz.com (Finland), Isohunt.com,[18] MoNova, BTMon, Fenopy,[19] TorrentPortal, Torrentzap, and BTJunkie.org aggregate and organize links to torrent files, which enable users to download infringing copies of movies, software and games.

- "One-click hosting sites," colloquially referred to as cyberlockers, are often used by pirates to offer access to infringing content, or hacked or cracked software codes and programs, which users locate through links or advertisements provided on forums, blogs, websites, social networking sites, etc. One-click hosting sites like

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[13] We refer to IIPA's filing in response to the October 1, 2010 request by the Office of the United States Trade Representative on the 2010 Special 301 Out-of-Cycle Review of Notorious Markets, noting USTR's initiative to include in its Special 301 report a "Notorious Markets" list, a "compilation of examples of Internet and physical markets that have been the subject of enforcement action and merit further investigation for intellectual property infringements." The 2010 Joint Strategic Plan on Intellectual Property Enforcement stated that USTR, in coordination with the office of the Intellectual Property Enforcement Coordinator, would initiate an interagency process to assess opportunities to further publicize and potentially expand on the notorious markets list in an effort to increase public awareness and guide related trade enforcement actions, and that as a result of that discussion, USTR has concluded that it can further publicize and potentially expand on the notorious markets list by publishing the notorious market list separately from the annual Special 301 report in which it has previously been included, following a separate, dedicated request for comments. *See* International Intellectual Property Alliance, *Written Submission Re: 2010 Special 301 Out of Cycle Review of Notorious Markets: Request for Public Comment, 75 Fed. Reg. 60854 (October 1, 2010), Docket No. USTR-2010-0029*, November 5, 2010, at http://www.iipa.com/pdf/IIPAOCRNotoriousMarketstoUSTRFINAL110510.pdf.

[14] Baidu frequently creates "top 100" charts and indexes inducing users to find and then download or stream infringing music without permission or payment. While a Beijing court ruled that its deeplinking service was not infringing – an unexpected development given prior court decisions (e.g., against Yahoo!China) – there is evidence of Baidu's contributions to, and profiting from, the infringing activities over its services. Baidu's deeplinking service also continues to provide infringing products to Hong Kong and Taiwan, as well as being accessible worldwide. Other unauthorized deeplinking music services that offer links to infringing material include SoSo, Sogou and Gougou.

[15] The technology connects individual computer users to each other directly, without a central point of management or server-hosting of copies of pirate content. Users download and install a P2P client application, enabling them to search for files on each other's computers and download the files they want. Most of these services that operate commercially do so by generating significant advertising income and other ancillary revenues through premium memberships.

[16] On October 26, 2010, U.S. District Judge Kimba Wood issued a permanent injunction against the company that operates the popular file-sharing software LimeWire and ordered managers there to disable "the searching, downloading, uploading, file trading...and/or all functionality" of the LimeWire software, Lime Wire announced. The press report noted "LimeWire, the software, was released 10 years ago and quickly emerged as one of the favorite ways to pass pirated music across the Web. Gorton and his company have acknowledged making millions from offering the software." *See* Greg Sandoval, *Judge slaps Lime Wire with permanent injunction*, CNet News, October 26, 2010, at http://news.cnet.com/8301-31001_3-20020786-261.html?part=rss&subj=news&tag=2547-1_3-0-20.

[17] On January 24, 2011, VeryCD.com reportedly suspended all links to movie and music content on the site. Some news sources reported that many file-sharing sites similar to VeryCD, including subpig.net and uubird.com, would shortly follow suit, but these sites were as of early February still in operation. IIPA has consistently included VeryCD as being among the worst copyright infringers on the Internet. This development, if permanent, will represent a significant step forward for IPR in China. We will continue to monitor the situation closely and report any further developments.

[18] Press accounts noted the Isohunt torrent index site was host to over 9 petabytes of files as of October 2010.

[19] Search results for "MoNova," "BTMon," and "Fenopy" revealed tens of major motion pictures available for free torrent download, including Blu-ray versions of classic and recent films.

Rayfile, Namipan, and 91files (China); Megaupload[20] and FileSonic (Hong Kong SAR); RapidShare; Hotfile (hosted in Panama); and FreakShare (Netherlands),[21] have been noted for employing business models that induce users to illegally distribute the (mostly illegal) content being stored.

- Infringements on sites like Youku and Tudou, which are "User-Generated Content" (UGC) sites where users upload/make available illegal copies of feature films or TV programs in China, are particularly concerning to the motion picture industry. Linking sites to these UGC sites or to other sites multiply the accessibility to unauthorized content, thereby significantly increasing the harm to copyright companies. Close to half of the illegal content available on the world's "topsites" is sourced from UGC sites in China.

- Streaming of infringing content occurs on such sites as PPLive and PPStream (China), which are examples of unauthorized IPTV webcasting channels. These sites webcast all kinds of television content without authorization, and TVAnts has been cited as a an example of the use of P2P technology to effect real-time illegal streaming of television content and live sporting event telecasts, again, causing significant harm to the motion picture industry.

- The social network site Vkontakte (Russia) (cited as one of the top 40 sites accessed in the world) has been cited as specifically designed and operated to enable members to upload music and video files, hundreds of thousands of which contain unlicensed copyright works, which other members search and stream on computers and mobile devices.

- Sites like KJ Med (formerly Kangjian Shixun - China) are cited as examples of providing/delivering unauthorized digital copies of medical and scientific journal articles on a subscription basis to customers in libraries and hospitals throughout China, with neither the consent of nor payment of a subscription fee to the actual rights holders.

- The distribution and sale of illicit hard goods through online markets, such as auction sites, business-to-business (B2B), and business-to-consumer (B2C) exchanges is a growing concern affecting several of the copyright industries including the business software, book publishing, and audiovisual industries. These sites/services may offer legitimate consumer goods, but many sellers specialize in illegal merchandise. Well-constructed sites and services fool consumers, selling well-packaged but poor quality counterfeit copies of everything from language-learning software to movie and television programming at retail prices. Some sites take active steps to stop and deter the sale of counterfeit goods, while others tacitly condone (and profit from) the illegal conduct. Some examples of the latter are TaoBao,[22] Mercadolibre, and QL.[23] Other online marketplaces, such as Modchip.ca and ConsoleSource.com, sell circumvention devices into countries where such trafficking is illegal.

- Internet cafés continue to provide opportunities, particularly in developing countries, for getting access to infringing music, motion pictures and videogames. The entertainment software industry is particularly afflicted by this form of Internet and end-user piracy, and while publishers are increasingly making available specialized licensing terms for these establishments, the lack of government oversight or incentives for legitimizing use only emboldens Internet café owners in their use of pirated or unlicensed product.

The massive challenge of online piracy requires a multi-faceted approach, but its roots are quite straightforward. Governments around the world must recognize the need for proportionate and effective steps to curb online piracy, and provide adequate legal frameworks for the protection of copyright online, including provisions in line with the two treaties adopted by the World Intellectual Property Organization (WIPO) in December 1996, the WCT and

[20] Megaupload entices users to infringe by offering "reward" schemes for numbers of downloads and then fosters further infringement by providing web links (and keys) which are then provided by the subscriber to others via direct e-mail or advertising on other websites to access illegal content. Megaupload users store a massive amount of content, much of it infringing.
[21] FileSonic and FreakShare are cited for their high volume of infringing game files and their low rates of compliance with requests to take down infringing material.
[22] TaoBao (China) has been cited as online marketplaces selling videogame circumvention devices and offering infringing products (books, textbooks) to consumers and businesses,
[23] Mercadolibre and QL are noted for allowing bulk distribution of counterfeit software and pose some of the biggest problems for the business software industry.

WPPT (sometimes referred to as "the WIPO Internet treaties"),[24] provisions recognizing online piracy as a form of cybercrime,[25] and appropriate levels of responsibility for online infringements that foster cooperation among the stakeholders (including ISPs) involved in the online supply chain.[26] Effective enforcement is critical to ensure the healthy development of a legitimate online market and stop or slow the massive harm being caused by online piracy every day.[27]

Enterprise (Including Government) End-User Piracy of Software and Other Copyright Materials

The unauthorized use of software within businesses, also referred to as "enterprise end-user software piracy," stands as the principal and most damaging form of infringement to the business software industry today, with the preliminary estimates of the commercial value of unlicensed U.S. software in 2010 exceeding $32 billion globally ($55 billion including non-U.S. firms). End-user software piracy rates remained well above 50% in most major developing markets in 2010. Reducing software piracy can have a profound impact on national economies. A recent IDC study for BSA, *Piracy Impact Study: The Economic Benefits of Reducing Software Piracy*, demonstrates through studies of 42 countries that reducing the piracy rate for PC software by 10 percentage points over four years would create $142 billion in new economic activity while adding nearly 500,000 new high-tech jobs and generating roughly $32 billion in new tax revenues. Front-loading the gain by lowering piracy 10 points in the first two years would compound the economic benefits by 36 percent, producing $193 billion in new economic activity and generating $43 billion in new tax revenues.[28]

Enterprise end-user software piracy occurs when someone in a business enterprise (or government agency) makes the decision to use software (or any other type of protected content) without paying for it. In the most typical example, a corporate entity purchases one licensed (or pirated) copy of software and installs the program on multiple computers. Other examples of end-user piracy include copying discs for installation and distribution in violation of license terms; taking advantage of upgrade offers without having a legal copy of the version to be upgraded; acquiring academic or other restricted or non-retail software without a license for commercial use; and swapping discs in or outside the workplace. Client-server overuse, another common example of end-user piracy, occurs when too many employees on a network have access to or are using a central copy of a program at the same time, whether over a local area network (LAN) or via the Internet. These enterprises receive the productivity benefits that the software provides, while foregoing the expense of licensed copies of the software, and enjoy an unfair commercial advantage over their law-abiding competitors who pay for their software. The unfair advantage can be understood on a macroeconomic level as well, since this means countries with high piracy levels compete unfairly with countries which have lower rates. For example, China's 79 percent software infringement rate means that Chinese enterprises competing with U.S. firms pay on average for just over one out of five copies of software they use, while their U.S. counterparts pay on average for four out of five copies.

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[24] This should include express recognition of protection of reproductions in the online environment, regardless of their duration (i.e., temporary as well as permanent copies capable of being further copied, communicated, or perceived should be recognized), since consumers engage in the full exploitation of copyright materials they license and receive over a network without ever making a permanent copy. This should also include a WIPO treaties-compatible definition of "communication to the public" including an interactive "making available" right.

[25] Governments should look to join and implement the Council of Europe Cybercrime Convention, Budapest, 23.XI.2001, which contains, in Article 10, "Offences related to infringements of copyright and related rights," an obligation to "adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the infringement of copyright [and related rights] … where such acts are committed wilfully, on a commercial scale and by means of a computer system," and which contains in Article 11 the obligation to "establish as criminal offences under its domestic law, when committed intentionally, aiding or abetting the commission" of Article 10 offenses.

[26] Many governments, particularly in Asia and Europe, have recognized the need for urgent steps to curb online piracy, and while not all approaches are favored by all the content industries equally, the goal is the same: to ensure effective action is available in practice against online piracy. There is consensus that bad actors who cause massive harm or profit from their direct involvement in the online infringing supply chain should be held responsible. There is also general agreement that all stakeholders in the online supply chain, including service providers, should have proper incentives to cooperate to eradicate bad behavior, which has traditionally included notice and takedown, and which at least includes effective and fair mechanisms to deal with repeat infringers in the non-hosted environment. The fact is that momentum is building for workable solutions and all recognize that solutions are required and desirable.

[27] IFPI reports in its *Digital Music Report 2011* that "Limewire, the biggest source of infringing downloads in the US, has been declared illegal and Mininova, a major BitTorrent site, shut down its illegal activities. The Pirate Bay was blocked by a court in Italy and its operators' criminal convictions were upheld by the Court of Appeal in Sweden."

[28] Business Software Alliance and IDC, *Piracy Impact Study: The Economic Benefits of Reducing Software Piracy*, 2010, at http://portal.bsa.org/piracyimpact2010/.

In many cases, enterprise end-user software piracy is attributable to negligence and poor software asset management (SAM) practices. Enterprises can also be victimized by unscrupulous computer manufacturers and dealers who engage in "hard disk loading," installing copies of software without authorization from the copyright holder onto the internal hard drive of the personal computers they sell.[29] In many cases, however, enterprise end-user piracy is undertaken willfully, with management fully aware and supportive of the conduct. Enterprise end-user software piracy also occurs in government agencies. Often, foreign governments fail to properly procure software for their hardware purchases, which leads to unauthorized use and under-licensing practices. In countries having significant state-owned enterprises (China being just one example of several), this problem is compounded. The principal way to address this is through government software legalization programs, including state-owned enterprises. It is also critical that governments vigorously pursue legalization of software within state agencies to set an example for private sector businesses and lend credibility to government enforcement efforts against software piracy.

Adequate laws prohibiting the unauthorized use of software in a business setting and enforcement of the same are critical to reduce piracy of business software. To effectively enforce against corporate end-user piracy, countries must provide 1) an effective civil system of enforcement, 2) provisional remedies to preserve evidence, including *ex parte* civil search orders in an expeditious manner, in line with Article 50 of TRIPS, 3) adequate compensatory civil damages including additional damages (where possible), and 4) criminalization of corporate end-user piracy as required by Article 61 of TRIPS. The software industry along with IIPA members strongly support the adoption of pre-established (statutory) damages by countries around the world, as mentioned as a possible remedy under TRIPS Article 45, and which will in some countries be required to meet the TRIPS Article 41 test to provide "remedies which constitute a deterrent to further infringements."[30] Another important way to systematically address software piracy is to implement proven, internationally recognized SAM practices that ensure an enterprise is efficiently managing its software and is not using software beyond what is licensed.[31]

End-user piracy is not limited to business software but now affects other copyright sectors. For example, in government, school and university facilities, photocopy machines are routinely used for commercial-scale book piracy. Where a government (for example, a country's education ministry or the university itself if state-run and/or state-owned) is directly involved or directly responsible for the facilities and implements used, including in particular government owned or controlled networks, policies and decrees must be promulgated and strictly enforced to ensure that these facilities are not used for infringing conduct. Governments have an opportunity and responsibility to engage in best practices with respect to the handling of intellectual property issues in the operation of government services, and they should be encouraged to lead by example.

Implementation of the WCT and WPPT

The WCT and WPPT provide a basic legal framework for the protection of online copyright. These treaties, in force since 2002, now have 88 and 87 adherents, respectively. Effective implementation of the global legal minimum standards embodied in the WCT and WPPT is critical in the fight against online piracy, and is a key element of the "adequate and effective" copyright protection that is demanded under the Special 301 program. These standards include clarifying exclusive rights for the online world, and prohibiting through civil and criminal remedies the production of or trafficking in tools that circumvent technological protection measures used by right holders to prevent access to content or the exercise of exclusive rights. A number of key trading partners, including Canada, New Zealand, and Israel among developed countries, and India, Malaysia, and Thailand among developing countries, have not yet ratified and/or properly implemented these treaties. The United States, which was one of the first countries to implement these

[29] Many consumers and many stores in countries surveyed in this Submission engage in "hard disk loading" which is a form of retail piracy.
[30] The U.S. has the lowest software piracy rate in the world and this is due in large part to the deterrent impact of infringers knowing that right holders can avail themselves of statutory damages.
[31] BSA provides tools and resources to help organizations manage software in a way that reduces compliance risks and maximizes return on investment. BSA SAM Advantage is an effort to help companies move more easily toward lasting adoption of the global SAM standards published by the International Organization for Standardization (ISO).

changes in its laws more than a decade ago, should continue to make it a priority to encourage other countries to follow this path.[32]

Circumvention of Technological Protection Measures (TPMs)

Copyright owners use technological protection measures (TPMs) to ensure that works made available in the digital and online environments are not easily stolen. For example, game consoles contain TPMs that aim to make it impossible to play infringing copies of games. DVDs are protected by "serial copy management system" (SCMS) to prevent second-generation copying and subsequent distribution or play, directly or over the Internet. Pay TV, premium cable and satellite services, and Internet services providing legitimate downloads or streaming of motion pictures similarly employ access and copy controls. Virtually all software packages are licensed with some type of TPM (e.g., encryption, passwords, or registration numbers). EBooks employ access and copy controls as well.

Unfortunately, just as content owners would take such self-help measures to protect their content in these emerging marketplaces, there are those who not only would like to gain unlawful access to the content or copy it, but increasingly, those who build their business models around providing devices, tools or technologies to fill such demand. The entertainment software industry has seen a proliferation in the development, manufacture and distribution of increasingly sophisticated circumvention devices, tools and technologies used to make and play infringing copies of games. The "mod chip,"[33] "game copier,"[34] and variations of the mod chip including "soft modding" are ravaging the console-based videogame industry and require a strong response in terms of legal measures and enforcement to make space for the sale of legitimate games. Purveyors of these devices are so sophisticated and determined to escape detection that they often separate their products into components, e.g., they ship devices that are only partially functional, intending that the user take steps required (such as downloading software) to restore the circumvention device to full functionality.

One of the key aspects of WCT and WPPT implementation involves adequate and effective protection against the circumvention of TPMs. In order for such protection to be "adequate and effective," as required by the WCT and WPPT, countries must address acts of circumvention, trafficking in circumvention devices, tools, and technologies, and the provision of circumvention services (such as the installing of "mod chips" into game consoles). Countries must also ensure that both TPMs that control access to content as well as TPMs that prevent the unauthorized copying or other exercise of exclusive rights are covered. Exceptions to protection in this area must be narrowly and carefully crafted to ensure that prohibitions on circumvention are not rendered ineffective. Civil and criminal (and where available, administrative) remedies should be provided. While implementation of TPMs protections has given rise to effective enforcement actions against distributors of unlawful circumvention devices, these efforts are critically undermined by countries that have yet to pass such provisions. Countries that lack TPM provisions, such as Canada, serve as a source of circumvention devices for consumers who live in countries where such devices are rightly prohibited.

Illegal Camcording of Theatrical Motion Pictures

One of the greatest concerns to the motion picture industry involves illegal recordings of movies from theaters, often just as the window for theatrical exhibition of a film opens. Approximately 90 percent of newly released movies that are pirated can be traced to thieves who use a digital recording device in a movie theater to literally steal the image and/or sound off the screen. The increase in the severity of this problem in recent years tracks the development of camcorder technology that makes detection difficult and copies near perfect. All it takes is one camcorder copy to trigger the mass reproduction and distribution of millions of illegal Internet downloads and bootlegs in global street markets just hours after a film's release and well before it becomes available for legal rental or purchase from legitimate suppliers.

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[32] The U.S. implemented the WCT and WPPT by enacting Title I of the Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998). The United States deposited instruments of accession for both treaties on September 14, 1999.

[33] There is a global market for modification chips (mod chips) sold on the Internet and in videogame outlets that, when easily installed into a console (by the user or by the pirate retailer), will bypass the access control "handshake" and allow the play of pirated games.

[34] "Game copier" devices also bypass TPMs to allow for uploading, copying, and downloading of games for handheld platforms.

Studios and theater owners have significantly increased security and surveillance in theaters all over the world to thwart would-be camcorders. Since 2003, the major motion picture studios have employed technology such as watermarking films (independent producers employ this technology as well), which enables film companies to discern the source of a stolen film through forensic analysis and trace it back to the very theater in which it was recorded. In 2010, there were over 1,000 instances of MPAA member company titles illegally recorded from cinemas around the world; approximately 60% were audio captures. This number does not include the numerous independent and local films illegally camcorded, and local and independent producers also suffer gravely from illegal camcording.

Anti-camcording legislation is critical to stopping the rapid increase in camcording. The United States and several other countries now have anti-camcording laws, and some others are actively considering legislation right now (including countries where the problem has grown out of control, e.g., in Thailand).[35] There remain critical steps on top of good legislation that the motion picture industry and cinema owners are pursuing to mitigate the level of unauthorized camcording activity. Despite industry efforts, it is clear that if camcording is not made a criminal offense and deterrent penalties are not applied, this crippling source piracy will continue, migrating to territories where enforcement is weak.

Game Cartridge Piracy

In addition to optical disc piracy, factory piracy of entertainment software in cartridge format also afflicts the entertainment software industry. Pirate videogame cartridges easily find their way into numerous countries around the world. Absent sustained enforcement actions against these factories engaged in illegal production and export, and the prosecution of their owners and financiers, there will be little progress in curtailing this piracy problem. This form of counterfeiting occurs almost entirely in China, which exports the pirate product globally.

Piracy of Books and Journals

The book publishing industry continues to be plagued by 1) large scale unauthorized photocopying of academic, scientific, technical and medical books, principally on and around university campuses,[36] 2) sophisticated infringing offset print versions of books (essentially akin to counterfeiting),[37] and 3) unauthorized translations of popular books.[38] Photocopy piracy in most countries involves unauthorized commercial copying of entire textbooks by copy shops on and around university campuses, often undertaken on a "copy-on-demand" basis to avoid stockpiling. Book pirates have shifted tactics and are increasingly electronically storing digitized files of books (academic or otherwise) and fulfilling customer requests on a "print-to-order" basis, thereby complicating the enforcement process due to lack of infringing stock-on-hand. Authorities need to recognize this shifting pattern and tailor enforcement efforts accordingly (e.g., by including cyber forensics in their investigations). Commercial print piracy is prevalent in many developing countries where unauthorized operations obtain masters or copies of books and run unauthorized editions, in English or via unauthorized translation, off a printing press. In other cases, licensed local distributors or publishers produce print overruns, printing more copies of a title than permitted by their license.

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[35] With the passage of the U.S. Family Entertainment and Copyright Act, which made camcording a federal offense, and similar state laws, as well as diligent efforts by local police, the United States is taking the necessary steps to provide adequate and effective remedies against camcorder piracy.

[36] Pirate photocopying takes place in a variety of venues, including commercial photocopy shops located on the perimeters of university campuses and in popular shopping malls, at on-campus copy facilities located in academic buildings, libraries and student unions, and in wholly illicit operations contained in residential areas or other underground establishments. Some of these operations are highly organized and networked, and technological advances are making the problem worse, since the shift from physical copy machines to electronic files means shops can print infringing books on demand. Publishers also suffer from unauthorized institutional or business-related photocopying for commercial research (often accompanied by failure to compensate rights holders through collective means or otherwise for copies made).

[37] These printers come in two varieties. In some cases, they are licensed printers or distributors who are engaged in offset printing beyond the scope of a valid license granted by the publisher. Others are wholly illegal pirate operations that have no license from the copyright owner at all. While many pirated copies are rife with errors or obviously of inferior quality, in some cases sophisticated printing technologies result in extremely high-quality pirate editions of books, making it difficult for users to distinguish between legitimate and pirate products.

[38] Publishers continue to suffer from unauthorized translations of books and journals of all kinds and genres, as well as trademark misuse. Unauthorized and unlicensed compilations abound in the academic context as well, in the form of course packs or even "original textbooks" that consist of sections of U.S. publishers' material, in English or in translation.

Book and journal piracy calls for aggressive action by law enforcement authorities. However, such efforts should be in conjunction with robust efforts by universities and educational institutions (especially state-run or state-funded) to promote appropriate use and copyright policies, in particular the use of legitimate books and journal publications. IIPA urges the U.S. Government to ensure that such acts of piracy are fully covered in all bilateral, regional, and multilateral engagements.

Optical Disc Piracy

While piracy is migrating to the online space for most of the content industries, piracy of optical disc (OD) products[39] continues to cause major losses to most copyright industries, especially in markets with low Internet penetration, where such formats continue to enjoy considerable market share, or where pirate console-based videogames are popular.[40] In recent years, factory production has somewhat waned as technological developments have meant fewer large-scale factories and more smaller, agile "burning" of music, books and reference publications, games, movies, and business software onto recordable media. CD-R or DVD-R "stack" bays (of ten or twenty discs when "daisy-chained") are lightweight and can produce multiple discs in minutes. They are being set up in factories but also in the smallest shops (and even in homes) where vendors can "burn to order." In some countries like China, Vietnam, and elsewhere in Southeast Asia, high-quality counterfeit DVDs and business and entertainment software packages continue to be coveted, and in some cases, fool consumers into thinking they are buying the real thing. Programs such as regularized surprise plant inspections and exemplar (sample) disc collection must continue, and where unlicensed illegal activity is detected, copyright laws and specialized OD laws or regulations should be aggressively enforced, including the imposition of deterrent penalties, license revocations, confiscation of equipment and raw materials, and heavy fines and imprisonment where warranted.

Pay TV Piracy and Signal Theft

The unauthorized broadcast, cablecast or satellite delivery of motion pictures, as well as other content (music and sound recordings) cost right holders dearly in 2010.[41] Three key problems are identified by the industry. The first is unauthorized cable access, which represents actions by individuals or groups to tap into the lines of legitimate cable TV companies without paying subscription fees. Most illegal taps likely occur on large cable systems in major metropolitan areas (examples in Asia including Manila and Bangkok). The second involves unauthorized operators, including actions by rogue cable companies, who take broadcast signals by unauthorized means (hacked set-top boxes or "overspill" boxes from neighboring countries), replicate the signal and sell it to hundreds or thousands of consumers. These pirate operators do not pay for any of their content. The third is subscriber under-declaration, which represents actions by cable companies who use some legitimate content, but do not pay for all the channels they use, or all the subscribers they serve.

Copyright laws and regulations imposing licensing on distributors of signals have in some countries been effective at weeding out unlicensed television distributors, consolidating the market into legitimate options (Lebanon is one example of this). In countries still experiencing major Pay TV theft, governments must take active steps to enforce.

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[39] OD include formats such as compact discs (CD), video CDs (VCD), CD-ROMs, CD-Recordables (CD-Rs), digital versatile discs (DVDs), DVD-Recordables (DVD-Rs), universal media discs (UMD), and high definition formats such as Blu-ray.

[40] Historically, organized piracy groups set up major factories at great expense in the promise of high-profit, relatively low-risk factory piracy. Markets such as China, Macau, Hong Kong, Taiwan, Malaysia, Thailand, Indonesia, and the Philippines in Asia; Russia and Ukraine in Central Asia; Bulgaria in Eastern Europe; even Pakistan in South Asia and Israel in the Middle East, have all at one time or another been afflicted by major factory piracy rings. As a result of this onslaught of factory production, affecting domestic markets and exported to neighboring and regional countries, a swift regulatory and enforcement response was required. IIPA and IIPA members developed tools including draft effective optical disc regulations, and in October 2003, APEC leaders agreed on the need to "stop optical disk piracy" and Ministers endorsed a set of "Effective Practices." The specialized regulatory framework, including licensing controls on the operation of optical disc mastering and replication facilities; the requirement to use identification tools to identify the plant of production; collecting exemplar discs; and tracking the growth of optical disc production capacity, including the cross-border traffic in production equipment and raw materials, principally optical-grade polycarbonate, has been sought in many countries. Regulations adopted in Bulgaria, China, Hong Kong, Indonesia, Macau, Malaysia, Nigeria, Oman, the Philippines, Poland, Singapore, Taiwan, Thailand, Turkey, and Ukraine, and under consideration elsewhere, accomplish much of what is needed.

[41] The Cable and Satellite Broadcasters Association of Asia (CASBAA) estimated the cost of piracy of Pay TV and signal theft in Asia alone at well over US$2 billion. *See* CASBAA, Asia-Pacific Pay-TV Industry 2010, at www.casbaa.com/publications?page=shop.getfile&file_id=67.

Pay TV signals are almost always encrypted, so accessing them usually requires the unauthorized decryption of the signal or the unauthorized use of the already-decrypted signal. It is therefore critical that copyright laws not only contain strong provisions prohibiting the unauthorized use (broadcast, communication to the public, public performance, transmission, etc.) of content, but also contain prohibitions on the decryption of encrypted cable or satellite signals, as well as the unlawful onward use of the signals already decrypted (whether lawfully or not). Of particular importance will be protections against the unauthorized retransmissions of such signals, and countries should afford appropriate rights in this area, including in the online environment.

Market Access

The U.S. copyright industries suffer from myriad market access barriers, investment barriers, and discriminatory treatment, making it difficult to compete in some foreign markets on a level playing field. It is truly impossible to discuss copyright infringement without recognizing the direct relationship between the fight against infringement and the need for liberalized market access to supply legitimate product (both foreign and local) to consumers around the world. We call upon policymakers to recognize and draw on this relationship to help make the reduction of market access impediments a key component of ongoing efforts to combat piracy. Identifying countries that deny effective market access for copyright industries is an integral part of the Special 301 process. Our experience shows that where there are restrictions on the distribution of legitimate products, impediments to the establishment of companies involved in the creation, manufacture or distribution of such products, or the imposition of prohibitively high tariffs and taxes on legitimate products entering the country, illegal operations fill the void with piratical product. Pirates are thus able to become exclusive distributors of the prohibited content or the products that have been priced out of reach for most consumers due to high tariffs, and are rewarded accordingly by cementing strong loyalties with their dedicated consumer base.

Market access restrictions identified in the IIPA 2011 Special 301 country reports in Appendix A include ownership and investment restrictions; discriminatory or dilatory content review/censorship systems;[42] restrictions on the ability to fully engage in the development, creation, production, distribution, and promotion of copyright materials; the inability in some countries to engage in the import, export, distribution, publishing, and marketing online of reading materials; the maintenance of quotas including screen time and broadcast quotas or complete bans on broadcast of foreign programming or advertising; discriminatory restrictions on the ability to import, license, or distribute copyright content; blackout periods for films; local print requirements; onerous import duties; and even a ban in one country (China) on the manufacture, sale and importation of videogame consoles. Sometimes well-intentioned anti-piracy initiatives, such as labeling (e.g., banderol or hologram sticker programs) or licensing requirements (examples include Thailand's "copyright owner" code requirement) get in the way of legitimate business or even have the opposite effect from that intended, precluding effective protection or enforcement against piracy. In addition, IIPA is concerned about recent policies that attempt to use market access leverage to compel transfers of IP.[43]

[42] In China, for example, entertainment software companies continue to face lengthy delays in the censorship approval process, wiping out the very short viable window for legitimate distribution of their videogame products. Further, while piracy enters freely in these markets, countries like China and Vietnam impose content review processes which clear the way for further piracy and, adding insult to injury, are discriminatory to foreign content, further skewing the playing field.

[43] As an example, over the past several years, China has been rolling out a series of policies aimed at promoting "indigenous innovation," with the apparent goal to develop national champions. Of particular concern are policies conditioning market access on local ownership or development of a service or product's intellectual property or aiming to compel transfers of foreign intellectual property to China. U.S. and international industry groups have raised serious concerns that these policies will effectively shut them out of the rapidly growing Chinese market and are out of step with international best practices for promoting innovation. IIPA has shared its concerns as well and strongly believes that the best ways for China to further enhance its innovative capacity are to: further open its markets to foreign investment; provide incentives to innovate by ensuring full respect for intellectual property rights including patents, copyrights and trademarks; avoid policies which establish preferences based on nationality of the owners of the intellectual property rights; and act forcefully and promptly to prevent misappropriation of such rights. On January 19, 2011, the White House "Fact Sheet" on "U.S.-China Economic Issues" (following on the recent JCCT outcomes) included the following important commitments: "The United States and China committed that 1) government procurement decisions will not be made based on where the goods' or services' intellectual property is developed or maintained, 2) that there will be no discrimination against innovative products made by foreign suppliers operating in China, and 3) China will delink its innovation policies from its government procurement preferences." These are welcome commitments, should be communicated to all levels of the Chinese government and should be accompanied by real changes in central and local government procurement practices.

The motion picture industry notes that customs officers increasingly try assessing *ad valorem* duties based on potential royalties generated from a film rather than the accepted practice of basing duties on the value of the carrier medium (i.e., the physical materials which are being imported). This is a growing, dangerous, and very costly phenomenon to the film industry, with Russia and WTO members such as Argentina, Ukraine and Uruguay currently applying *ad valorem* duties on projected revenues, and others (such as Indonesia) considering doing the same. Unfortunately, as governments look for additional revenue sources, it is far too easy to target foreign products entering their market and assess duties on projected royalties. After changing their valuation schemes, India and Ukraine have demanded "overdue" payments for retroactive valuation of audiovisual products entering their market, a practice that disrupts participation in the market and penalizes U.S. companies for their prior success. The International Chamber of Commerce recognized in a policy statement, *The Impact of Customs Duties on Trade in Intellectual Property and Services,* that such a practice distorts markets, increases costs for suppliers and buyers, depresses commercial activity, and impedes the availability of intellectual property in the country imposing the tariffs.

U.S. Government officials, working with their overseas counterparts, should fundamentally reexamine the effectiveness of, and policy justifications underlying, market access prohibitions or impediments that restrict legitimate producers' ability to compete with pirates, and should strive, as a high priority issue, to open markets to copyright and eliminate or phase out market access barriers including those identified in this year's IIPA submission.

D. IIPA RECOMMENDATIONS FOR THE 2011 SPECIAL 301 LISTS

This year IIPA has analyzed the copyright law and enforcement problems in 39 countries, and has recommended 33 of them for placement on the Priority Watch List or Watch List,[44] or for monitoring under Section 306 of the Trade Act, or as deserving of special mention for copyright-related concerns.

PRIORITY WATCH LIST	WATCH LIST	SECTION 306	COUNTRIES DESERVING SPECIAL MENTION
Argentina	Belarus	Paraguay	Albania
Canada	Brazil		Bulgaria
Chile	Brunei		Croatia
China	Greece		Latvia
Costa Rica	Israel		Moldova
India	Italy		Pakistan
Indonesia	Kazakhstan		Switzerland
the Philippines	Kuwait		
Russian Federation	Lebanon		
Spain	Malaysia (OCR)		
Thailand	Mexico		
Ukraine	Poland		
Vietnam	Romania		
	Saudi Arabia		
	Singapore		
	Tajikistan		
	Turkey		
	Turkmenistan		
	Uzbekistan		
13	19	1	7

[44] Egypt is currently on USTR's Special 301 Watch List. IIPA's 2011 recommendation for Egypt is for USTR to "defer" its consideration of Egypt's status until the political situation has stabilized.

E. CONCLUSION

The health and competitiveness of the U.S. economy depends on a thriving copyright sector that creates jobs and exports. It is essential to the continued growth and future competitiveness of these industries that our trading partners provide high levels of protection for copyright, more effective policies and tools to enforce that protection, and freer, more open markets. To meet the constantly evolving threats to copyright worldwide, our country's response must remain flexible, innovative and committed. Special 301 remains one cornerstone of the U.S. response, and we urge USTR and the Administration to use Special 301 and other trade tools available to encourage the countries identified in our recommendations this year to make the political commitments, followed by the necessary actions, to bring real commercial gains to the United States through strengthened copyright and enforcement regimes worldwide.

We look forward to our continued work with USTR and other U.S. agencies on meeting the goals identified in this Submission.

Respectfully submitted,

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