



February 17, 2009

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: Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment ("Special 301"), 74 Fed. Reg. 4263 (January 23, 2009)

Dear Mr. McCoy:

This filing responds to the Request for Written Submissions appearing on January 23, 2009 in the Federal Register which invites public submissions on policies and practices that should be considered in 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 pursuant to Section 182 of the Trade Act of 1974, 19 U.S.C. §2242 ("Special 301"). Specifically, in the following submission and appendices, the International Intellectual Property Alliance (IIPA) describes the key challenges and initiatives that define the copyright industries' agenda for the coming year, discusses the types, levels, and costs of copyright piracy, evaluates best enforcement practices to reduce piracy, and reports on 48 countries or territories, including 39 of which should be ranked on the Special 301 Priority Watch List or Watch List, or monitored under Section 306 of the Trade Act.

## OVERVIEW OF THE IIPA 2009 SPECIAL 301 SUBMISSION

Economic Challenges and the Copyright Industries as the Driver of Growth: With the health and competitiveness of the U.S. economy in dire straits, the U.S. copyright industries remain one of the few industry sectors capable of outpacing the rest of the economy in producing new jobs and returning revenue to our country when it needs it most. Through the 1990s and this first decade of the 21<sup>st</sup> century, the "core" U.S. copyright industries have added new workers to our economy at two to three times the rate of the economy as a whole. One out of every 20 workers is now employed in the copyright industries, and more than one in 10 workers are in jobs that are in, or depend on, the "core" copyright industries. Most of these industries generate over half their revenue from outside the U.S. and that revenue contributes to the creation of U.S. jobs. Notwithstanding this success, the copyright industries suffer enormous losses around the world as a result of the theft of their works. This substantially reduces their revenue, directly impacting U.S. employment.

Theft of U.S. Creative Content is a Global Problem: This report highlights the ways in which U.S. intellectual property is stolen all over the world. Motion pictures, music, business software, books, and entertainment software each confront serious piracy problems, but the source of the threat is not always the same. For several industries, perhaps most immediately movies and music, the fastest growing problem – and a problem to which we devote much attention in this report – is Internet piracy, through unauthorized file-sharing, streaming, and uploading of content onto sites that make it available instantaneously worldwide. The entertainment software industry has seen recent and dramatic growth in P2P piracy, including across traditionally strong markets in Western Europe. Piracy of movies and music via mobile phones and other mobile devices is also rapidly appearing, prejudicing possibilities for legitimate commerce in a world in which entertainment will be immediately available on a device that fits in your pocket or purse. The software industry, whose birth was in this country and which is the largest of all the copyright sectors, is damaged most by piracy from the unauthorized use of software applications by commercial businesses and even government agencies.



But while piracy of physical product has declined as a percentage of the market over the last 20 years, due to effective use of many of the trade tools described in this submission, it is still a massive problem for the copyright industries. Factory production of optical disc products, CDs, DVDs, etc., is still prevalent in some countries, including exports which distort the targeted market. However, this industrial production is quickly being overtaken by local “burning” of CDs and DVDs, often with content obtained from the Internet. The wholesale commercial printing, commercial photocopying and electronic reproduction of books and journals remain huge problems for the publishing industry, most notably occurring in and around universities or other educational institutions. For the movie industry, one of the major sources of pirate product, in the physical and online world, is the surreptitious “camcording” of films just as they open or prior to their opening theatrically and the distribution of copies via the Internet or other means to eager consumers who do not want to wait, or pay, for the home video version. Factory piracy of entertainment software in cartridge format primarily in Asia afflicts the entertainment software industry. All these various types of piracy and the many countries in which they occur, and the means to combat them, are described in this report.

**U.S. Trading Partners Must Improve their Enforcement Systems:** The primary problem is that many of our trading partners have not yet, or will not, establish and employ effective and deterrent enforcement mechanisms to combat piracy. The key contributing factors to massive copyright piracy losses and high piracy levels include: (1) the failure to provide expeditious, non-burdensome, and non-costly enforcement procedures, (2) the failure to provide deterrent remedies and sanctions, whether civil, administrative, or criminal; (3) the failure to provide modern legal structures to provide tools to law enforcement and the judiciary to effectively enforce their laws in order to deter piracy; and, in some cases; and (4) the denial of effective market access for copyright products on an open and non-discriminatory basis.

**The Bottom Line:** 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 not only free and open markets, but also high levels of protection for copyright, and significantly more effective policies and tools to enforce that protection. To meet the constantly evolving threats to copyright worldwide, our country’s response must remain flexible, innovative and committed.

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## A. IIPA AND THE COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY

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 applications software; 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, CDs, and audiocassettes; and textbooks, trade books, reference and professional publications and journals (in both electronic and print media).

On January 30, 2007, the IIPA released an economic report entitled *Copyright Industries in the U.S. Economy: The 2006 Report*, the eleventh study written 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 latest data show that the “core” U.S. copyright industries<sup>1</sup> accounted for an estimated \$819.06 billion or 6.56% of the U.S. gross domestic product (GDP) in 2005. These “core” industries were responsible for 12.96% of the growth achieved in 2005 for the U.S. economy as a whole (this means that the growth contributed by these core industries (12.96%) was almost double their current dollar share of GDP (6.56%)). In addition, the “core” copyright industries employed 5.38 million workers (4.03% of U.S. workers) in 2005. And the report, for the first time, provides data on the estimated average annual compensation for a worker in the core copyright industries: \$69,839 in 2005, which represents a 40% premium over the compensation paid the average U.S. worker.

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<sup>1</sup> 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. The “core” copyright industries are those that create copyrighted materials as their primary product. *The 2006 Report* is posted on the IIPA website at <http://www.iipa.com>.



Finally, estimated 2005 foreign sales and exports of the core copyright industries increased to at least \$110.8 billion, leading many other major industry sectors, including chemicals and related products; motor vehicles, parts and accessories; aircraft and associated equipment; food and live animals; and medicinal and pharmaceutical products. IIPA is in the process of updating our economic survey to reflect 2007 data, which is the most currently available information; we expect to issue this new report in mid-2009.

The study discussed above looked at the impact of the copyright industries on GDP and employment. Another study, also done by Stephen Siwek, sought to measure the losses suffered by the U.S. copyright industries and the U.S. economy from global piracy. In a report prepared for the Institute for Policy Innovation (IPI), *The True Cost of Copyright Industry Piracy to the U.S. Economy*,<sup>2</sup> Siwek gathered data that reflected the piracy losses incurred in 2005 by four of the major U.S. copyright industries: motion pictures, sound recordings, business software and entertainment software/video games (the study did not include book publishing). The report estimates these losses conservatively at \$25.6 billion. Using a widely accepted mathematical model, the study further measured the lost economic output, jobs and employee earnings that are the economic consequences of copyright piracy. The study concluded that, in that year, copyright piracy from motion pictures, music and sound recordings, and business and entertainment software generated losses to the U.S. economy of \$58.0 billion in total output, cost American workers 373,375 jobs and \$16.3 billion in earnings, and cost federal, state, and local governments \$2.6 billion in tax revenue.

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## B. COPYRIGHT INDUSTRIES' INITIATIVES AND CHALLENGES IN 2009

IIPA's submission aims to provide information that will assist governments to improve copyright protection, reduce global piracy levels, and open markets to works protected by copyright. Strong and effective copyright protection benefits every country by providing incentives for creativity and innovation, promoting economic, cultural and scientific development, and fostering cultural diversity. Over the past quarter century, the U.S. government has effectively employed a panoply of trade policy tools that have stimulated many positive changes in the global environment for the protection of intellectual property. Today's challenge is to identify and strengthen the tools that will be most effective in meeting new threats to that environment.

In the early 1980's, most countries' laws did not protect U.S. works at all, and 90% to 100% piracy levels prevailed in most developing countries. Since the first marriage of intellectual property and trade in the Trade and Tariff Act of 1984 and formation of the IIPA, the subsequent adoption of the "Special 301" provisions in the 1988 Trade Act, and the adoption or modification of the U.S. unilateral trade preference programs, such as GSP, CBERA, ATPA and others, U.S. government initiatives have helped produce significant legal and enforcement improvements. This largely untold success story has produced billions of dollars of increased revenue and millions of new jobs to both U.S. and local copyright industries. However, despite these successes, the threats to U.S. creators and the U.S. copyright industries remain grave and are growing. These threats emanate largely from the growth of digital and online piracy; the increased organization and sophistication of commercial pirates; and most importantly, the failure of governments to adequately enforce their new laws against the rampant piracy of intellectual property. An effective response to these challenges will require a renewed and expanded commitment to use both the old and new tools available to industry and governments.

The copyright industries are extremely grateful for the U.S. government's efforts in promoting copyright reform and effective enforcement. But, as is clearly demonstrated in the country surveys included in this report, organized commercial piracy, whether digital or analog, tangible or over the Internet, combined with the failure of many foreign governments to enforce effectively their existing copyright and related laws, threatens to outpace the fight to combat it. The trade tools and enforcement expertise exist to make significant progress on the following objectives in 2009. What is needed is the political

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<sup>2</sup> *The True Cost of Copyright Industry Piracy to the U.S. Economy*, by Stephen E. Siwek of Economists, Inc., prepared for the Institute for Policy Innovation, IPI Policy Report #189, October 2007, posted at [www.ipi.org](http://www.ipi.org).



will for governments to take the actions necessary to address piracy meaningfully and to lower piracy rates locally and globally.

The following objectives are not necessarily listed in order of priority, since different issues may demand priority attention in different countries.

### Internet Piracy, Electronic Commerce and the WIPO Internet Treaties

**The Scope of the Problem:** Electronic commerce is integral to the emerging business models of the copyright industries and their continuous efforts to respond to diverse and evolving consumer demands. IIPA places a high priority on ensuring that this critical means of commerce is not undermined by the unauthorized distribution of content online or jeopardized by discriminatory regulations. Unfortunately, online and digital copyright piracy have exploded over the past several years. IIPA places the highest priority on securing both the legal and practical tools necessary to protect intellectual property rights in the digital age thereby fostering legitimate electronic commerce.

All of the copyright industries are offering consumers exciting and diverse legal ways to enjoy their content and products. The motion picture industry works with well over 275 legitimate websites around the world, providing high quality video-on-demand content to consumers. There are sites that cater to every manner of consumer viewing including ad-supported viewing, rental viewing, download-to-own purchase, and subscription viewing. In the United States, there are over 50 such sites, including sites offering on-demand catch-up on television shows whether by streaming, rental and/or download-to-own. There are also numerous social networking sites, such as Bebo, Gaia, MySpace, peer-to-peer companies Bittorrent.com and Vuze, that provide movies legitimately. In 2008 alone we have seen major developments like the launch of new video streaming aggregator, Hulu, and its increasing number of partner sites; rental and download-to-own films on Apple's iTunes; ad-supported streaming of films on Disney, Hulu and Jaman; record viewing of online videos of the Olympics on NBC, as well as new announced efforts by sports leagues like the NBA and NHL.

On-demand, full-length television shows and films from the major studios are now being provided to consumers by all the major mobile operators. Apart from streaming to mobile devices, studios are also working to make content available to load onto those devices through media like SD flash memory cards, similar to those used in digital cameras. These are sold pre-loaded, and may soon be used to download content from in-store kiosks.

For the music industry, growth in the market for digital sales of music is essential to an industry suffering significant declines in the overall market for recorded music due to piracy. In 2008 the legitimate online music market grew 25% to \$3.7 billion in revenues. The U.S. is the world leader in digital music sales, accounting for 50% of the legitimate global music market. Even with extremely large unauthorized downloading around the world, digital platforms now account for 20% of recorded music sales globally, up from 15% a year earlier.

Book and journal publishers have exploded onto the electronic commerce scene in recent years. Professional and scholarly journal publishers have largely led the way, long offering electronic access to a wide variety of academic and professional journals for individual and institutional users worldwide. E-books of all kinds are growing by the day, including a proliferation of services offering electronic access to academic textbooks, reference materials and trade bestsellers. In October 2008, publishers and authors joined Google in announcing a proposed new partnership to facilitate greater access to electronic versions of books through the Google Book Search program, resolving an earlier legal dispute.<sup>3</sup>

Notwithstanding the impressive efforts by the copyright industries to rapidly develop and roll-out new online business models, copyright theft continues to undermine, and in some cases prevent, the development of legitimate markets for electronic commerce in copyrighted materials. The Internet and other networks linking mobile devices are being employed as highly efficient, low-cost networks for infringing activity, reaching any part of the world with ease regardless of where infringing material first enters the system. Consequently, the U.S. copyright industries face the daunting task of trying to enforce their legal rights in an online world where borders and distances have decreasing practical significance.

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<sup>3</sup> See <http://books.google.com/booksholders/>. The proposed agreement awaits court approval.



Protection in this global online network is only as strong as its weakest link. In the United States, for example, access to pirated products is often facilitated through the operation of “tracker sites” or repositories of pirated content housed in other countries. To meet the challenge of online piracy, enhanced international norms, more effective enforcement of those norms, and law enforcement cooperation must be top priorities. Moreover, securing greater inter-industry cooperation in the fight against online and mobile piracy is imperative to curb the theft of online content.

The online piracy threat is fact, not fiction. For example, IFPI estimates that there were 40 billion unauthorized downloads globally in 2008, and that the piracy rate was an estimated 95%, well above that prevailing in the United States. This translates into billions of dollars in lost revenue at a time when the sales of physical products are also declining. The sound recording industry also reports that in 2008, it removed 3 million infringing web links, up from 500,000 in 2007, thus stopping potentially hundreds of millions of unlicensed downloads.

The online piracy threat is instantly global, not just local. The entertainment software industry undertook a study to estimate the number of copies made of 13 game titles through the BitTorrent and EDonkey networks during December, 2008.<sup>4</sup> Copies were estimated to have been made by users across 223 separate countries and territories. The total number of game downloads made from these 13 titles during this one-month period was 6,429,279,<sup>5</sup> with year-round impact obviously being many times greater. The countries with the heaviest unauthorized downloading by volume were Italy (17.%), Spain (15.1%), France (7.9%), Germany (6.9%), and Poland (6.1%). The heaviest pirate downloading countries per capita were Israel, Spain, Italy, Portugal and Poland. Network resources provided by Telecom Italia (Italy) were implicated in 11.6% of these downloads, followed by Telefonica de Espana (Spain) (7.8%); France Telecom (France) (3.9%); Polish Telecom (Poland) (3.6%); Deutsche Telecom AG (Germany) (2.6%); IUnet (Italy) (2.1%); Neuf Cegetel (France ) (1.6%); Jazz Telecom S.A. (Spain) (1.57%); Free SAS (France) (1.56%) and Uni2 (Spain) (1.53%).

While Internet piracy’s global economic impact on legitimate business models is undeniable, and will threaten their very existence unless piracy is brought under control, quantifying those economic losses and allocating them to particular countries is an extremely challenging problem. Because of this challenge, IIPA’s estimates of piracy levels and of trade losses due to piracy do not yet fully take into account online piracy. Affected industries are seeking to improve their abilities to measure the prevalence and impact of online piracy. What is clear, however, is that displaced sales of legitimate products and services are occurring and that an urgent response is needed.

IIPA and its members urge governments to adopt laws that will prevent and punish online piracy, and to enforce those laws vigorously. An environment that will facilitate the growth of legitimate online delivery of copyrighted materials entails not only the establishment of adequate rights and remedies under copyright, but also rules that compel all entities involved in the transmission of copyright materials to implement reasonable practices. A focused and comprehensive strategy, as outlined below, is required.

**The Legal and Enforcement Solutions:** Well established international norms such as the WTO TRIPS Agreement contribute valuable elements to the needed legal infrastructure to protect electronic commerce and combat Internet piracy. The WTO TRIPS Agreement contains a technology-neutral obligation to provide “expeditious remedies to prevent infringements and remedies which constitute a deterrent to future infringements” (Article 41). The enforcement tools described in TRIPS must be applied against online piracy.

The two treaties adopted by the World Intellectual Property Organization (WIPO) Diplomatic Conference in Geneva in December 1996 provide an additional and more tailored framework for what is needed to protect the transmission of content in the new e-commerce economy. These treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), have been in force since 2002. 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

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<sup>4</sup> Therefore, these results do not reflect downloads of other game titles made during that period, nor do they reflect game downloads made through other file sharing networks (Ares, Gnutella, Direct Connect) or other web protocols (websites, cyberlockers, IRC, blogs, etc.).

<sup>5</sup> The total number of completed downloads made of the two most popular titles during this one-month period was 4,787,441.

exclusive rights in the online world, and specifically prohibiting the production of or trafficking in tools that circumvent technological protection measures (TPMs) used by right holders to protect copyrighted works, coupled with criminal prohibitions that effectively deter commercial circumvention activities.

Ever since the WIPO Treaties were adopted, IIPA and its members have joined with their counterpart copyright industries around the world to push for ratification and full implementation of the WCT and WPPT in all countries. Sixty-nine (69) countries now belong to the WCT, sixty-eight (68) have joined the WPPT, and the momentum continues to build, with 14 original EU member states expected to join Belgium (which already joined) by ratifying both treaties in the near future. Ensuring that these standards are effectively embodied in national law is critical. If countries delay in making these needed changes, the prejudicial impact on electronic commerce and the protection of intellectual property online might be irreversible. The U.S., which was one of the first countries to implement these changes in its laws more than a decade ago, should continue to make it a priority to encourage other countries to follow this path.<sup>6</sup>

In addition, the Free Trade Agreements between the US and a number of its trading partners specify and clarify the standards in the TRIPS Agreement and the WIPO Treaties. The binding obligations that the FTAs create should form the underpinnings of the online enforcement systems in these countries, and eventually in all countries.

In parallel with the physical world, there is no substitute for vigorous enforcement of the new and existing laws against digital and online piracy. To protect the revenue streams and millions of new jobs created by the copyright industries, governments must be agile in dealing with a medium that is constantly shifting and evolving. Laws and practices of nations must be designed to secure broad cooperation among all relevant parties to prevent piracy in the first place; to quickly locate and bring down infringing Internet sites or content; and to pursue actions against offenders. Public education about the dangers of online infringement must be emphasized as well. As global boundaries continue to lose much of their practical relevance because of Internet growth, the usual lines separating the roles of industry and government in policy, enforcement and education must also evolve. Close coordination will be the key to success in this challenging new environment. Global adoption of the Council of Europe Cybercrime Convention, which requires countries to adopt effective remedies for online copyright infringement, and which facilitates law enforcement cooperation across borders, is another key element of a successful strategy.

These law reform and enforcement measures are critical to deter pirates from destroying the promising new tools for making copyrighted products available globally. IIPA members, and their member companies, have stepped up to the challenge of online piracy. They devote increasing resources and technical expertise to ferreting out online piracy and taking action against it. But the success of these efforts depends to an increasing extent on obtaining the cooperation of other parties, including network operators and the manufacturers and distributors of access devices. All these parties have a vital stake in building a robust legitimate marketplace for electronic commerce in copyrighted works. However, the incentives and disincentives provided by the laws have not always kept pace with these realities.

Practical, fair and understandable regimes of secondary liability for online infringement are essential to motivate all participants to cooperate in implementing the reasonable practices that will make the online marketplace less hospitable to infringers. Voluntary arrangements among copyright owners, service providers and equipment manufacturers are a critical component of the fight against online piracy, the U.S. government should also urge all its trading partners to adapt and refine their secondary liability regimes to reflect the current technological realities, or to adopt modern, flexible systems where they do not exist. The goal must be to encourage responsible conduct on the part of all parties involved in the transmission of copyrighted materials. This includes swift and cost-effective ways to achieve takedowns of infringing content and services and mechanisms to ensure that repeat infringers find no safe harbor on the Internet.

Finally, we must find a global solution that discourages unauthorized peer-to-peer file sharing through aggressive enforcement against unauthorized uploaders of infringing product, whether of musical recordings, movies, business or entertainment software or literary material, as well as against services that enable such uploading for the purpose of

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<sup>6</sup> 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.



encouraging infringement. As we know from our own experience here in the U.S., new legal online services for delivery of copyrighted material can succeed only if they are not undermined by unfair competition from unauthorized sources.

It is critical that governments, educational institutions and similar enterprises that provide broadband connections to their employees, students or others develop and enforce strong internal policies (such as official memoranda, decrees, or executive orders in the case of governments) to prevent illegal file sharing of copyrighted materials, including through the use of peer-to-peer technologies. When their networks transmit only authorized copyrighted material, they are also helping to ensure the security of their networks against unauthorized incursions or other potentially crippling interventions into their systems.<sup>7</sup>

Industry has been hard at work on these critical issues, but we need the help of the U.S. and foreign governments to make the Internet safe for e-commerce in copyrighted materials.

### Effective and Deterrent Enforcement Against Copyright Piracy

The copyright industries' most important global goal is to significantly reduce piracy levels in order to open foreign markets, and create increased revenue and employment. Only through effective and deterrent enforcement, as required by the WTO TRIPS Agreement, the WCT and WPPT, and the various Free Trade Agreements (FTAs) which the U.S. has negotiated, can this goal be met.

The industries and the U.S. government have been engaged for over twenty years in many countries to try to bring piracy down to acceptable levels. But many still have not meaningfully upgraded their enforcement systems to meet their international obligations by adopting effective remedies and imposing deterrent penalties. In a growing number of countries, police agencies are more able, and often more willing, than in the past to conduct raids against pirate producers, wholesalers and retail sites. But all too often the legal system fails to follow through. For effective deterrence, prosecutors and judges (or, where applicable, administrative agencies) must impose penalties that remove the monetary incentives that drive the pirate trade. Small fines will not deter pirates who stand to gain hundreds of thousands to millions of dollars. Deterrence requires substantial prison sentences in these cases. Again and again, in country after country, major pirates either manipulate the system to evade conviction (often as a result of systemic delays or corruption), or suffer only small monetary fines that utterly fail to discourage them from continuing in their illegal business, or others from following their example. Again and again, raided stores reopen quickly with new pirate product, online pirates move their servers or take on a new online identity, or major pirate producers continue their trade in a new guise to avoid the next enforcement action, which may never come, or may come only after the pirate has lined his pockets with millions more in illegal income.

Ultimately countries undertake effective reform because they understand that it is in their own interest. It is essential that the U.S. government continue to take steps that will bring about such an understanding. Those steps should be supplemented by actions that increase the capacity of willing governments to take effective action. Among the strategies that could be employed are:

- Continuing to coordinate enforcement training, including localized training and capacity-building that demonstrates the benefits of deterrent enforcement.

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<sup>7</sup> In 2006, Ministers of the 21 Members of the Asia Pacific Economic Cooperation regional group recommended that "government entities" (which should include educational institutions funded by the State) should ensure that copyright usage, including on P2P networks, is legal. The APEC Ministers specifically "Recommended that APEC Leaders should endorse the principle that government entities should not use illegal software or other content on their computer networks, especially pertaining to Internet usage," noting that "This keeps APEC at the forefront of addressing the growing problem of illegal file sharing on the Internet." Leaders cemented the understanding among the APEC Members in November 2006 in Hanoi, Vietnam that all "government agencies" should ensure that copyright usage is legal. The APEC Leaders stated the following:

We ... called on member economies to exercise appropriate oversight to achieve the objective that central government agencies use only legal software and other copyright materials; that such bodies implement effective policies intended to prevent copyright infringement on their computer systems and via the Internet, in accordance with relevant international conventions and domestic laws and regulations concerning copyright and related rights; and that central government funds are not used by contractors or recipient institutions to purchase illegal software or other illegal copyright materials.



- Fostering further coordination among and between U.S. agencies, industry, and international organizations with training resources.
- Creating “best enforcement practices” models, including legislative provisions and specific and practical reforms at the police, prosecutorial and judicial levels. These would be based on the TRIPS text and the U.S. FTA models, but with far greater detail to assist the enforcement authorities. These could include recommendations for “zero tolerance” policies against retail piracy and specific actions to be taken in the area of online piracy. These should also include model sentencing guidelines that would help the authorities assess what penalties will actually deter pirates.

IIPA and its members applaud USTR for spearheading an international effort to forge an “Anti-Counterfeiting Trade Agreement” (ACTA) among like-minded trading partners. This effort, announced on October 23, 2007, recognizes the critical importance that effective enforcement now plays in improving the global trading environment in IPR-based products. The U.S. was joined by key trading partners in making this announcement, including Japan, the EU, Mexico, Switzerland, Canada, Korea and New Zealand. It is essential, however, that such an agreement, if negotiated, set out the very highest standards of effective enforcement to which the rest of the world should aspire.

The Special 301 process must specifically target enforcement in a direct and clear way. Many countries believe that Special 301 ranking decisions can be made on the basis of law reform, followed by enforcement “promises” alone. Experience has taught us that this simply has not worked. Countries should be made acutely aware that they will not see a change in their Special 301 placement unless they take the *specific* enforcement actions necessary that actually *reduce* piracy rates (and, conversely, that they will see a change in placement when such actions are in fact undertaken).

### Optical Disc Piracy

Piracy of optical disc (OD) products continues to cause major losses to most copyright industries. Increasingly, many sectors of the copyright industry use a common set of media to distribute their products worldwide. These “optical disc” products 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 newer, high definition formats such as BluRay. An explosion in the world’s capacity to produce optical disc products has been driven by the ever-growing worldwide demand for copyrighted high-tech, entertainment and educational products, but also by the potential for pirates to generate billions of dollars in illegal income. Optical disc production capacity has for years greatly exceeded the legitimate demand for such products, whether pre-recorded discs or blank media, with much of the difference inuring to the benefit of illegal pirate enterprises.

In recent years, the problem of industrial production of pirate OD product in factories has to a great extent been overtaken by more decentralized, smaller-scale operations that use blank recordable optical media and OD “burners” to make unauthorized copies on a commercial basis. Whether “burned” or factory-produced, pirate CDs, VCDs, CD-ROMs and DVDs, CD-Rs and DVD-Rs containing protected music, sound recordings, audiovisual works, business software, entertainment software and books and journals have decimated the market for legitimate U.S. products.

Optical Disc Piracy – Factory Production: For 2009, IIPA identifies the key optical disc piracy factory production trouble spots as: China, Nigeria, Russia and to a lesser extent Indonesia and Malaysia. These are markets where immediate actions should be taken by the governments to curtail pirate production. The optical disc factory piracy problem confronting the copyright sectors, now familiar to governments worldwide, has demanded new and creative legislative and enforcement solutions. As part of countries’ WTO TRIPS obligations to provide deterrent enforcement against piracy “on a commercial scale,” every country whose optical disc production facilities are producing significant pirate product should create and enforce a specialized regulatory framework for tracking the growth of optical disc production capacity, including the cross-border traffic in production equipment and raw materials, principally optical-grade polycarbonate. These regulatory regimes should include strict licensing controls on the operation of optical disc mastering and replication facilities, and the requirement to use identification tools that identify the plant in which production occurred and that help lead the authorities to the infringer. So far such regimes have been established in Bulgaria, China, Hong Kong, Indonesia, Macau, Malaysia, Nigeria, Oman, the Philippines, Poland, Singapore, Taiwan, Thailand, Turkey, and Ukraine, and are under consideration in Bahrain, India, Vietnam, and other countries. Increasingly, pirate optical disc production is migrating from jurisdictions with optical disc



production regulatory regimes to countries that have not adopted these regulatory tools or do not enforce them, such as Bangladesh, Nigeria, Vietnam, and many others mentioned in this submission.

Above all, the regulations put in place to combat OD piracy must be aggressively enforced. Governments must have the authority to conduct surprise inspections of optical disc production facilities – and they must use it. Deterrent penalties, including license revocation, confiscation of equipment and raw materials, and heavy fines and imprisonment, must be consistently and efficiently imposed.

IIPA and its members have developed a number of resources to help governments in fashioning an effective optical disc regulatory system. We also note that governments have recognized the importance of effective regulations. In October 2003, APEC leaders agreed on the need to “stop optical disk piracy” and endorsed a set of “Effective Practices.” We commend these to all governments addressing this problem. We stand ready to work with USTR to assist governments in understanding, drafting and implementing these recommendations into national law.

Optical Disc Piracy – Commercial “Burning”: As regulatory regimes have been put into place and enforced, pirates have taken advantage of technological developments, and moved production increasingly from the “factory” locus to smaller, more mobile venues that are often more private and harder to police. Using cheaper and more portable consumer “recordable” technology, pirates with a very small investment can easily and cheaply burn thousands of CD-Rs and DVD-Rs of copyrighted material for commercial sale. We refer here not to individual consumers “burning” copies but to aggressive commercial exploitation – often by the very same syndicates that operated the factories, and sometimes even in the same locations as the factory equipment. Increasingly around the globe, seizures of pirate optical disc product in 2008 were overwhelmingly of “burned” product. Commercial “burning” has probably become the biggest piracy threat in the “hard goods” optical media market.

This development calls for innovative responses. Improved enforcement machinery must aim at implementing zero tolerance policies against the offer for sale of pirate product. If pirates have no place to sell their products, their ability to manufacture becomes superfluous. Some countries are already responding by enacting absolute bans on street sales, with some positive results. More countries should do the same.

#### Piracy by Organized Crime Syndicates

Because of the immense profits that can be garnered by producing pirate optical disc products, this illegal business has been taken over in many countries by organized crime syndicates, making it even more difficult for local authorities to combat the problem. These criminal syndicates are highly organized, are linked across national boundaries, and have powerful friends within governments. They control large amounts of capital, and exploit complex distribution networks to engage in many kinds of criminal activity beyond copyright infringement, including in some cases drug smuggling, trade in illegal munitions, money laundering, and even funding of terrorist organizations.

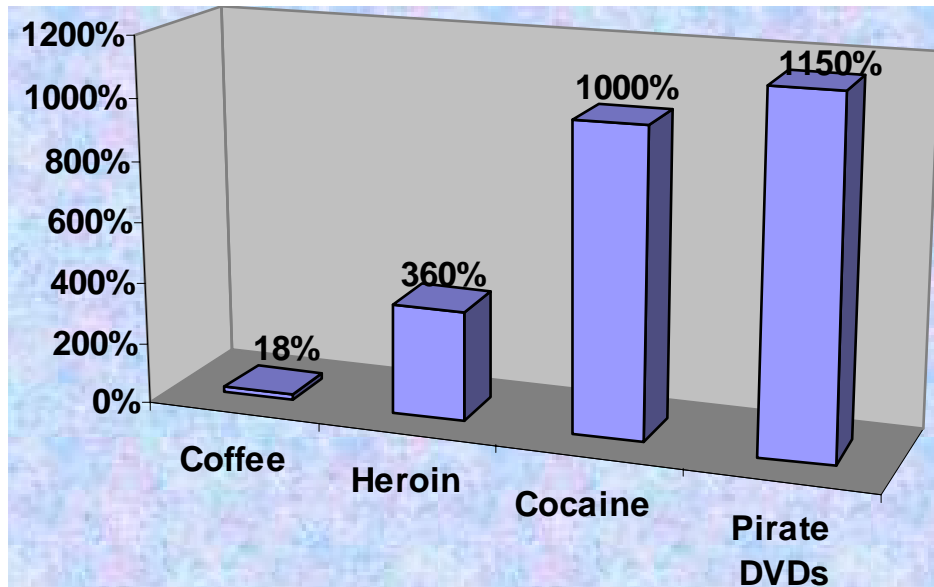
The kinds of large-scale piracy operations run by syndicates are a global threat, as the lucrative funds from piracy fund other illegal activities, like drug trafficking, gun running and even terrorism. These syndicates operate worldwide. For example, syndicates with optical disc production facilities in Southeast Asia work with partners in South America to conduct a thriving trans-Pacific trade in pirate music CDs, entertainment software, and other optical disc products. These criminal networks are highly sophisticated and are becoming increasingly dangerous to deal with. Starting in 2003, many syndicates began moving their illegal trade into local CD-R and DVD-R “burning” and to the Internet in response to improved local enforcement against factory pirate production.

In an October 2005 study by MPA, it was reported that the estimated criminal revenue in 2004 for IPR theft was \$512 billion, while for drug trafficking it was \$322 billion.<sup>8</sup> The following table from that same study shows graphically that the

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<sup>8</sup> Motion Picture Association, *Optical Disc Piracy v. Illegal Drug Trafficking*, October 2005, at 2. At about the same time, MPA released another study, *Organized Crime & Motion Picture Piracy*, from which some of the examples in the text are taken.

mark-up for DVD piracy is higher than that for cocaine and heroine, with the risk of getting caught and receiving deterrent punishment significantly less.<sup>9</sup>



*Source: Adapted from UK National Criminal Intelligence Service SU/Drug Project (2004); Cocaine markup is Colombia to Spain/U.K.; Heroin markup is from Iran to U.K.; DVD markup is from Malaysia to UK.*

Some recent examples of the involvement of organized crime on a global basis include:

- In February 2009, Polish police raided an organized criminal syndicate that produced and distributed pirate music and films on an industrial scale. The pirate operation distributed an estimated nine million albums, making it what is believed to be the largest copyright infringing disc operation ever shut down by police action in Europe.
- In December 2008, Australian police executed five search warrants across South Western Sydney uncovering an estimated one million pirate Asian movie and music discs. The seizure is the largest ever of pirate music and Asian movies in Australia.
- In November 2008, Brazilian officials discovered a smuggling ring importing blank optical discs from Uruguay to sell in the pirate markets of Brazil. Investigators uncovered the blank discs in the duty free shops of the border town of Rivera in Uruguay. The smugglers sourced blank discs from the free port of Montevideo and used the duty free shops as distribution points.
- In November 2008, the Argentine coast guard raided the notorious La Salada market and seized enormous amounts of counterfeit product. The authorities have already identified some organized criminal syndicates that operate in the market.
- In October 2008, Mexican customs officials seized 8.7 million blank discs imported from Taiwan in two major border operations. The organization that brought them into the country had used the Free Port of Panama as an onward shipment point.
- In September 2008, Royal Thai Police and industry cracked a piracy ring believed to be run by Malaysian mafia in the heart of Bangkok. They raided an abandoned warehouse, the front of which was disguised as a junk garage, hiding an air-conditioned back area housing one DVD replicating line, one printing machine, and 2,400

<sup>9</sup> *Id.*, at 3



kilograms of polycarbonate used to produce pirate optical discs and “stampers” of major U.S. motion pictures for export to Malaysia.

- In August 2008, Mexican law enforcement authorities raided 70 warehouses and 15 laboratories around the infamous market of Tepito in Mexico City. The area is a well-known distribution point for pirated music and film in Mexico. A force of 375 police and 10 prosecutors from the Attorney General’s office (PGR) carried out the raids. According to the authorities, the organization targeted in the raids supplied pirate music and film product throughout the country.
- In June 2008, Turkish authorities ran raids against 86 locations in Istanbul in operation “Yarasa,” targeting an organized criminal group involved in the manufacture and distribution of pirate discs in various districts of Istanbul. The raids resulted in the seizure of more than 4 million inlay cards, 200,000 burned disks, and 112 disc burners. Turkish law enforcement officials were among the 46 persons arrested for selling confidential information about planned raids and for reselling seized pirate discs back to the pirates.
- In May 2008, Rome Fiscal Police arrested 12 members of an organized criminal gang involved in the distribution of pirate CDs and DVDs. The arrests took place in Naples and Milan. A series of raids uncovered six illegal pirate factories, five in Naples and one in Milan, which contained 350 burners.
- In May 2008, Brazilian police conducted a major raid in the town of Presidente Prudente which led to the dismantling of a network of illegal replicating facilities in a city regarded as a major distribution point for pirate CDs and DVDs. The Regional Organized Crime Unit of the Military Police (GAECO) in the State of Sao Paulo conducted the operation in the town, some 300 miles from city of Sao Paulo, on 29th April 2008.
- In April 2008, the Australian Federal Police busted an international music piracy ring operating from Sydney which exported pirate music. The organized gang in Australia is alleged to have manufactured tens of thousands of re-mixed compilation albums for distribution through a complex network throughout Australia, New Zealand and the Pacific.
- In February 2008, Russian police raided a warehouse near Moscow and seized 500,000 infringing optical discs. The Moscow City Police’s Economic Crime Department undertook the raid acting on intelligence of organized criminal activity.
- In January 2008, Polish border police arrested eight people involved in the smuggling and manufacture of pirate CDs and DVDs. Officers seized illegal firearms, including handguns, a machine gun and a sawn-off shotgun; contraband cigarettes and tobacco; as well as € 50,000 in cash. The border police smashed the organized gang which smuggled music and films believed to be produced in Russia and Ukraine as well as producing their own counterfeit discs.
- In December 2007, Saudi Arabian police ran raids against four warehouses seizing close to 500,000 units of pirated music and video cassettes, VCDs and DVDs. The police also found a large cache of explosives and weapons and arrested 15 people.

The private sector is not equipped to fight organized crime. This is a job for law enforcement authorities. Company representatives and counsel have in some countries experienced threats on their lives or physical intimidation, and have even been injured when their investigations began to make progress. In some cases, this has prevented any enforcement activity by the private sector.

To assist national governments, even INTERPOL has recognized that there is an urgent need for national and international enforcement authorities to coordinate their efforts and cooperate with the IP right holders in the private sector.<sup>10</sup> Back in 2000, the INTERPOL General Assembly approved the addition of IP crime to the Organization’s official mandate. Later the INTERPOL Intellectual Property Action Group (IIPCAG) was formed as a public-private partnership.

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<sup>10</sup> See INTERPOL IPR page at <http://www.interpol.int/public/financialcrime/intellectualproperty/default.asp>. For more information on recent 2008 activities, see INTERPOL Intellectual Property Rights Programme Review 2008, posted at <http://www.interpol.int/Public/FinancialCrime/IntellectualProperty/Publications/IPNewsletter.pdf>. For example, in February 2008 INTERPOL launched its Database on International Intellectual Property (DIIP) Crime. The Third INTERPOL Intellectual Property Crime Training Course brought together participants from police forces and the private sector all over the world was held in Italy on October 2008. This was co-hosted by the Italian Guardia di Finanza in partnership with police and member organizations of the INTERPOL IP Crime Action Group. Numerous operations were conducted throughout the year, working with both public government agencies as well as private sector organizations.



The U.S. government should take a leadership role, both bilaterally and in multilateral fora, to place the issue of effective copyright piracy enforcement on the agenda of agencies dealing with organized economic crime. It should encourage countries with existing laws and special investigative procedures against organized crime to bring them to bear against syndicate operations involved in piracy. Where such laws and procedures are not in place, the U.S. government should encourage governments to adopt them and to include, among predicate offenses, intellectual property right violations.

### End-User Piracy of Business Software and Other Copyrighted Materials

The unauthorized use and copying of software by businesses result in tremendous losses to the U.S. and global economies. The great majority of the billions of dollars lost to U.S. software companies from business software piracy in 2008 were attributable to this end-user software piracy. To safeguard the marketplace for legitimate software, governments must have in place both substantive standards of protection and adequate enforcement mechanisms.

For the business software industry, it is particularly critical, given the growing use of electronic networks to make software available commercially to corporate and other end users, to ensure that the reproduction right covers both temporary as well as permanent reproductions. It is likely that very soon, virtually all consumers will engage in the full exploitation of software they license and receive over a network without ever making a permanent copy on their hard drive. They will simply access the software, in accordance with mutually agreed license terms, then load it into the random access memory (RAM) of their workstation or server, use the software and, when finished, close the program or shut down the computer—all without the software ever being permanently stored on the computer's or server's hard drive. Failure to make clear that such temporary reproductions are covered by the exclusive reproduction right is a violation of the Berne Convention, the WTO TRIPS Agreement and the WIPO Copyright Treaty. Great progress has been made globally on this critical issue, and IIPA calls upon the U.S. government to continue to seek legislative changes and clarifications on this point. As of today, over 100 countries/territories provide protection for temporary copies as part of the reproduction right either explicitly or by interpretation, or had committed to do so, or had draft legislation pending which would provide such protection.

Enforcement is a critical part of reducing global piracy rates for business software, which exceed 50% of the market in the developing world. The biggest challenge to the business software industry is to persuade governments to take effective enforcement action against enterprises that use unlicensed software in their businesses. To effectively enforce against corporate end-user piracy, countries must provide an effective civil system of enforcement, provisional remedies to preserve evidence, and deterrent criminal penalties for piracy. More specifically, it is critical that countries provide *ex parte* search orders in an expeditious manner, deterrent civil damages and criminalization of corporate end-user piracy as required by Article 61 of TRIPS. Industry, along with USTR, has raised the need for strong procedural and remedial enforcement measures around the world. Although some countries have made attempts to improve enforcement through special enforcement periods and action plans, most of these proposals for action have not been sustained over time or have not resulted in deterrent criminal fines and jail terms. Additionally, many countries still do not criminalize corporate end-user piracy or provide civil *ex parte* measures in practice – even though their TRIPS obligations require both.

End-user piracy is of course not limited to business software but now affects all copyright sectors. For example, in government, school and university facilities, photocopy machines are routinely used for commercial-scale book piracy. Where the government is directly involved or directly responsible for the facilities and implements used, policies and decrees must be promulgated and strictly enforced to ensure that these facilities are not used for infringing conduct. In addition, internet café piracy in several countries continues to plague the entertainment software industry. While entertainment software 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.

### Piracy of Books and Journals

The book and journal publishing industry faces not only the same challenges encountered by other entertainment and high-tech industries (digital and online piracy), but must contend with other methods of infringement as well. This piracy comes primarily in two forms — commercial photocopying and print piracy.



Unauthorized commercial-scale photocopying of books and journals is responsible for the industry's biggest losses in most countries/territories worldwide. This photocopying takes place in a variety of venues — commercial photocopy shops located on the perimeters of university campuses and in popular shopping malls; on-campus copy facilities located in academic buildings, libraries and student unions; and wholly illicit operations contained in residential areas or other underground establishments. These operations are highly organized and networked, and technology advances are making the problem worse. Digitally scanned covers, for instance, allow pirates to conceal text that is often of poor quality, and electronic files containing book text are now routinely seized as part of enforcement actions against copy shops. This shift from physical copy machines to electronic files—allowing shops to print infringing books on demand — complicates the enforcement process due to lack of infringing stock in hard goods form. Authorities must recognize this shifting pattern and tailor enforcement incentives and activities accordingly. 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).

In addition, the U.S. publishing industry continues to suffer from unauthorized printing of entire books, including academic textbooks, professional reference books and trade books. 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. Print piracy is especially prevalent in South Korea, Egypt, Thailand, Pakistan, India, China and other countries with large printing capacity. 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.

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.

These types of piracy call for the same kind of aggressive enforcement techniques discussed throughout this submission, accompanied by robust efforts to legalize the practices of universities and other educational institutions, especially those that are government-supported. Governments must recognize the serious damage done to economies, culture and the educational environment by letting such infringements persist. IIPA urges the U.S. government to ensure that such acts of piracy are fully covered in all bilateral, plurilateral and multilateral engagements.

#### Camcorder and Videogame Cartridge Piracy

Camcording as “source piracy” has grown exponentially over the last few years, tracking the development of camcorder technology that makes detection difficult and copies near perfect. MPAA analysis of counterfeit copies seized throughout the world reveals that more than 90% of illicit recently released movies on DVDs can be sourced back to theatrical camcording. For example, in 2007, more than 530 cases of illegal camcording were detected from theaters around the world and most of these films were stolen within 24 hours of their theatrical release. They were then uploaded to the Internet, replicated in optical disc plants, and burned to discs, affecting markets around the world. This trend continued through 2008.

It is evident that camcorder piracy migrates to those markets where enforcement is weak. 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 U.S. is taking the necessary steps to provide adequate and effective remedies against camcorder piracy. Progress has also been made globally on this critical issue and IIPA calls upon the U.S. government to continue to seek legislative changes that make unauthorized camcording a criminal offense.

While the motion picture industry recognizes that anti-camcording legislation is critical to stopping the rapid increase in camcording, it also recognizes that there are critical steps that it and its business partners in the film industry must undertake on their own. As a result, it has and will continue to expend significant resources in undertaking various measures 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.

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.

### Using FTAs to Improve Global Standards of Copyright Protection and Enforcement

The negotiation of bilateral and regional free trade agreements (FTAs) over the past fifteen years has proven to be of great value to the U.S. copyright industries. These negotiations have provided an important opportunity to persuade our trading partners to take on enforceable obligations to modernize their copyright law regimes and to improve enforcement procedures. The agreements have helped U.S. copyright industries to compete fairly in foreign markets, and have helped our trading partners develop their domestic copyright industries – a true win-win for both parties.

IIPA urges the Obama Administration to build on the momentum that has built over the past three presidencies. FTAs hold a critical place in U.S. trade policy – particularly for the copyright industries. Since copyright issues are not being addressed in the Doha Round of multilateral negotiations under the World Trade Organization, the FTA process has become by far the most fruitful avenue to address the law reform challenges brought on by developments in technology.

At the time of this submission, FTAs with Singapore, Chile, Australia, Jordan, Morocco, Bahrain, Oman, the six nations in the Central America-the Dominican Republic-U.S. FTA, and Peru, had entered into force. Negotiations with South Korea, Colombia and Panama have been concluded. We urge Congressional approval of these FTAs. Unfortunately, negotiations with the United Arab Emirates and Thailand have stalled and negotiations with Malaysia have slowed. IIPA strongly supports the renewal of Trade Promotion Authority (TPA) “fast track” negotiating authority and urges the new Congress to renew it in 2009 and for the new Administration to conclude existing negotiations and commence new FTAs with key trading partners.

IIPA trusts and expects that the valuable precedents established in these earlier agreements will be carried forward to the ongoing FTA negotiations, and with any more FTA negotiations opened in the future. We commend the U.S. for laying the groundwork for a possible Trans-Pacific Partnership FTA with Singapore, Chile, New Zealand, Brunei, Australia, Peru and Vietnam, and we would welcome the extension of FTA benefits to all of these countries. In these negotiations, industry will continue to seek full implementation of the WIPO Internet Treaties; stronger substantive protection in other areas, including the extension of the term of copyright protection; and detailed and effective enforcement obligations that make clear the requirement to enforce copyright in all areas, including in particular on the Internet, with expeditious and deterrent civil and criminal remedies. We encourage the Administration to use these opportunities to secure high levels of protection and enforcement that are critical to the development and sustainability of robust e-commerce.

### Market Access

In the experience of IIPA, its members and companies, there is a strong connection between a country's ability to foster the introduction of legitimate product quickly and efficiently to market, and its ability to combat piracy effectively. 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. Denial of 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.

Pirates also gain a stronger position when the introduction of new products to market is unreasonably delayed, whether through lengthy content review periods, specialized packaging or stickering requirements, or arduous licensing or registration protocols. Here again, illegal operations will move to take advantage of any temporary product voids by speeding pirated copies to market, maximizing the advantage provided by their informal but highly effective exclusive distribution windows. These delays can be particularly damaging to "hit-based" businesses that depend on strong initial sales of a relatively small number of highly popular products to recoup investments made in other, less immediately successful ones.

We urge U.S. officials and overseas national policymakers to make elimination of market access barriers — whether such barriers are content or investment based — a priority in their discussions with relevant foreign governments. Specifically, foreign policymakers should:

- Reexamine the effectiveness of, and policy justifications underlying, market access prohibitions or impediments that restrict legitimate producers' ability to compete with pirates. Industries involved in the creation and distribution of content-based products stand willing to abide by reasonable and fairly applied censorship processes. However, it is both legitimate and necessary to ask whether these measures serve their intended purpose, or whether alternative channels of distribution for these products (such as through authorized or unauthorized online delivery) render these policies ineffectual or less capable of achieving that purpose.
- Work with industry to consider ways of further streamlining those restrictions and/or processes that are deemed essential, including applicable content review, labeling or licensing requirements.
- Work with industry to promote greater understanding and transparency of applicable rules, regulations and procedures governing compliance. Greater transparency in governing regulations facilitates more rapid and more uniform compliance, and affords fewer opportunities for abuses of these processes.
- Enforce penalties for non-compliance with regulatory requirements (such as for health and safety) uniformly, including against vendors of piratical product, and consider the creation of enhanced penalties for non-compliance by pirate operations.

The country reports we submit today highlight many of the most damaging market access barriers that copyright industries face. We urge USTR to continue to monitor these countries' progress along these lines. The U.S. government and foreign governments should consider market-opening policies as an additional tool to combat piracy, and to promote economic and technological competitiveness.

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## C. IIPA RECOMMENDATIONS FOR THE 2009 SPECIAL 301 LISTS

This year IIPA has analyzed the copyright law and enforcement problems in 48 countries/territories, and has recommended 39 of them for placement on the [Priority Watch List](#) or [Watch List](#), or for monitoring under [Section 306](#) of the Trade Act. We also mention specific issues in nine additional countries/territories that deserve increased U.S. government attention. As in prior years, IIPA's submission contains several separate sections. Included in this year's submission are the following:

- [This letter](#), which summarizes the submission and outlines IIPA's recommendations for cross-cutting initiatives to be undertaken by the copyright industries and the U.S. government for 2009.
- [Appendix A](#), which compiles IIPA's country placement recommendations, estimated trade losses due to piracy, and estimated levels of piracy. As indicated in the chart below, IIPA recommends that 13 countries be placed on the [Priority](#)



Watch List and 25 be placed on the Watch List. We also recommend that out-of-cycle reviews be conducted later this year for Spain, Malaysia and Saudi Arabia, and that Paraguay remain under Section 306 monitoring.

- Appendix B, which describes IIPA members' methodologies for calculating estimated trade losses and piracy levels.
- Appendix C, which includes all the country surveys.<sup>11</sup> In most country reports, IIPA has described the piracy levels in each of the sectors in each of these countries/territories (where available). This should prove helpful in identifying trends and in determining whether enforcement efforts have actually been successful in reducing piracy levels in the particular country.

PRIORITY WATCH LIST	WATCH LIST	SECTION 306 MONITORING	OTHER COUNTRIES/ TERRITORIES DESERVING SPECIAL MENTION
Argentina Brunei Canada Chile Egypt India Indonesia Mexico Pakistan People's Republic of China Philippines Russian Federation (GSP) Thailand	Belarus Brazil Bulgaria Costa Rica Greece Hungary Israel Italy Kazakhstan Kuwait Lebanon (GSP) Malaysia (OCR) Peru Poland Romania Saudi Arabia (OCR) South Korea Spain (OCR) Sweden Tajikistan Turkey Turkmenistan Ukraine Uzbekistan (GSP) Vietnam	Paraguay	Azerbaijan Bangladesh Colombia Hong Kong Japan Jordan Nigeria Switzerland Taiwan

- Appendix D, which provides an historical chart of countries/territories' placement on Special 301 lists by USTR since 1989, a year after the Special 301 legislation became effective. 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."<sup>12</sup> Under these criteria, these 15 countries/territories named by

<sup>11</sup> Country surveys were prepared by counsel to the IIPA, Michael Schlesinger, Maria Strong, Eric H. Smith, Steven Metalitz, and Eric Schwartz, and are based on information furnished by IIPA's seven member associations. We thank Kristen Schumacher for her contribution in preparing, producing and distributing this submission. The country reports contain information which should not be construed as providing legal advice.

<sup>12</sup> Uruguay Round Agreements Act Statement of Administrative Action, *reprinted in* H.R. Doc. No. 103-316, vol. I, at 362 (1994).



IIPA are particularly vulnerable, having failed to correct their piracy and/or market access problems during the 20 years that Special 301 has been in existence.

- Appendix E, which contains the Special 301 histories of countries/territories that we have recommended for placement on a list this year, many other countries that have appeared on USTR's lists in the past and are still candidates for monitoring intellectual property practices, and certain other countries that have never appeared on a USTR list but which deserve special attention.

**Ongoing GSP IPR Reviews:** IIPA also calls attention to ongoing intellectual property rights reviews under the Generalized System of Preferences (GSP) trade program. IIPA has been a strong supporter of the GSP program, and over the years has filed numerous petitions requesting the U.S. government to initiate GSP IPR reviews of copyright law and enforcement practices in targeted countries.<sup>13</sup> This submission details copyright developments in 8 of the top 12 countries that received benefits from the GSP program in 2008, specifically: India (\$3.96 billion of U.S. imports under GSP), Thailand (\$3.53 billion), Brazil (\$2.75 billion), Indonesia (\$2.16 billion), Argentina (\$1.4 billion), Turkey (\$916 million), the Philippines (\$913 million) and Russia (\$593 million). As of February 17, 2009, the U.S. government is continuing GSP IPR investigations on the copyright law and enforcement practices in three countries in which IIPA was the original petitioner: Russia, Lebanon, and Uzbekistan. It is imperative that the Administration use this program to hold beneficiary countries accountable to the IPR obligations in the statute.

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#### D. CONCLUSION

Special 301 remains a cornerstone of U.S. intellectual property and trade policy. We urge the Administration to use Special 301, and the tools available under the GSP, CBI, ATPA, CBTPA, and AGOA programs, and to consider IIPA's proposals to amplify attention to ineffective and non-deterrent enforcement—to encourage the countries/territories identified in our recommendations this year to make the political commitments, followed by the necessary actions, to bring their enforcement (and where necessary their copyright) regimes up to international standards.

We look forward to our continued work with USTR and other U.S. agencies to bring about major improvements in copyright protection and enforcement worldwide.

Respectfully submitted,



Eric H. Smith  
International Intellectual Property Alliance

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<sup>13</sup> Since 1999, IIPA (and in one case, a coalition of 6 of 7 IIPA members) has filed 18 GSP IPR petitions with USTR, requesting the initiation of IPR investigations against the following countries: Poland, Peru, Lebanon, Dominican Republic, Ukraine, Moldova, Uzbekistan, Armenia, Kazakhstan, Belarus, the Kyrgyz Republic, Brazil, Russia, Guatemala, Costa Rica, Uruguay, Thailand, and Pakistan. Of these 18 petitions, USTR initiated reviews in 10 countries: the Dominican Republic, Ukraine, Moldova, Uzbekistan, Armenia, Kazakhstan, Brazil, Russia, Lebanon, and Pakistan. IIPA withdrew its request to initiate reviews in three cases (Peru, Uruguay and Thailand). Of these 10 reviews, so far USTR has completed its investigations and terminated its reviews in 8 cases (Armenia, Moldova, Dominican Republic, Ukraine, Brazil, Pakistan, plus Turkey—a case which IIPA petitioned for in 1993 and was closed in 2001). In May 2006, USTR closed its investigation against Kazakhstan.