



February 15, 2002

Mr. Joseph Papovich
Assistant USTR for Services,
Investment and Intellectual Property
Office of the United States
Trade Representative
600 17th Street, N.W., Room 301
Washington, D.C. 20508

Re: Request for Public Comment on the Identification of Countries
Under Section 182 of the Trade Act of 1974 (as amended) ("Special
301"), 66 Fed. Reg. 66429 (Dec. 26, 2001)

Dear Mr. Papovich:

This filing responds to the Request for Written Submissions appearing on December 26, 2001 in the Federal Register. The request invites submissions from the public on policies and practices that should be considered in connection with designating countries as Priority Foreign Countries pursuant to Section 182 of the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2242 ("Special 301"). The Special 301 provisions call upon the United States Trade Representative to identify countries which, *inter alia*, "deny adequate and effective protection" to U.S. intellectual property or deny "fair and equitable market access" to U.S. persons who rely on intellectual property protection.

The International Intellectual Property Alliance (the "IIPA" or "Alliance") submits our discussion of the status of copyright law reform and enforcement in 51 separate country reports. We also highlight six initiatives in this letter, and identify 13 countries which we have not recommended be on a Special 301 list but which merit ongoing attention by the U.S. government.

One country deserves special mention – Mexico. While not recommending any announcement or ranking with respect to Special 301, IIPA highlights the importance that we attach to addressing long-standing piracy problems in Mexico. Losses to U.S. copyright industries in Mexico approach a staggering \$1 billion per year, warranting *immediate* steps to address this grave situation. Given the special relationship that exists between our countries, our two Presidents, and our cultures, we believe that both governments must make this issue a priority in their bilateral relationship, and we look forward to seeing tangible results in the very near term. Should bilateral engagement not yield results and produce significant decreases in the current levels of piracy, we believe that the U.S. will need to reconsider whether other available trade tools, including Special 301, NAFTA and TRIPS, should be used to ensure the protection of U.S. copyrighted materials as required under U.S. and international trade laws.

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 is comprised of six trade associations, each representing a significant segment of the U.S. copyright community. These member associations represent over 1,100 U.S. companies producing and distributing materials protected by copyright laws throughout the world – all types of computer software including business applications software and entertainment software (such as videogame CDs and cartridges, personal computer CD-ROMs and multimedia products); theatrical films, television programs, home videos and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and textbooks, tradebooks, reference and professional publications and journals (in both electronic and print media).

In December 2000, the IIPA released an economic report entitled Copyright Industries in the U.S. Economy: The 2000 Report, the eighth such 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 industries¹ accounted for 4.9% of U.S. GDP or \$457.2 billion in value-added in 1999. In the last 22 years (1977-1999), the core copyright industries' share of GDP grew at an annual rate more than twice as fast as the remainder of the economy (7.2% vs. 3.1%). Also over these 22 years, employment in the core copyright industries more than doubled to 4.3 million workers (3.2% of total U.S. employment), and grew nearly three times as fast as the annual employment growth rate of the economy as a whole (5.0% vs. 1.6%). In 1999, the U.S. copyright industries achieved foreign sales and exports of \$79.65 billion, a 15% gain from the prior year. The copyright industries' foreign sales and exports continue to be larger than exports of almost all other leading industry sectors, including automobiles and auto parts, aircraft, and agriculture. 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 to the copyrights on which this trade depends. IIPA expects to release a new economic study this spring.

B. OUTLINE OF IIPA'S SPECIAL 301 SUBMISSION

As in prior years, IIPA's submission contains several separate sections. It is important for the reader to review not only each country survey in Appendix C, but the other appendices that describe key elements (e.g., industry initiatives, methodology) that may be referenced in the country survey. Included in this year's submission are the following:

- This letter, which (1) outlines IIPA's recommendations for cross-cutting initiatives to be undertaken by the copyright industries and the U.S. government for 2002; (2) summarizes our submission this year; and (3) identifies additional countries – not recommended for placement on the Special 301 lists – which require continued attention by USTR and other appropriate agencies. Individual country reports are not provided for these 13 additional countries;
- Appendix A, which contains IIPA's country placement recommendations, estimated trade losses due to piracy, and estimated levels of piracy;
- Appendix B, which describes our members' methodology for calculating estimated trade losses and piracy levels;

¹ 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 which create copyrighted materials as their primary product.

- Appendix C, which includes all the country surveys;²
- Appendix D, which provides a historical chart of countries' placement on Special 301 lists by USTR since 1990; and
- Appendix E, which contains the Special 301 histories of the countries which appear as our recommendations this year, and many other countries which have appeared on USTR's lists in the past and are still candidates for monitoring of their intellectual property practices.

C. COPYRIGHT INDUSTRIES' INITIATIVES AND CHALLENGES IN 2002

Improving intellectual property protection by employing the various bilateral and multilateral tools available to the U.S. government is the goal of this submission. Without these trade tools and their aggressive implementation, the U.S. copyright industries would still be facing the 90% to 100% piracy levels throughout the developing world that we faced in 1984-85 when these trade programs commenced. The vast improvement over the last decade and a half is a largely untold success story. Significantly improved laws and their extension to U.S. copyrighted works through treaty adherence and improved enforcement have brought billions of dollars of increased revenue and millions of new jobs both to U.S. and local copyright industries. However, despite these successes, the U.S. copyright industries (and copyright creators and their industries worldwide) still face grave threats in the 21st century. These threats, emanating in part from the growth of digital and on-line technology, require a renewed commitment to use both the old and new tools available to industry and governments.

In our last three Special 301 filings, IIPA outlined a series of challenges facing the copyright-based industries. This year, we have updated and reorganized these priorities, and added an additional one – improving copyright law and enforcement in the context of bilateral and regional Free Trade Agreements (FTAs).

The copyright industries are extremely grateful for the U.S. government's effort in support of these objectives. IIPA urges a continuing and heightened effort to make further progress on all these objectives this year. The following objectives are not necessarily listed in order of priority, since different issues may demand priority attention in different countries.

ELECTRONIC COMMERCE, COPYRIGHT PIRACY ON THE INTERNET AND THE WIPO INTERNET TREATIES

The Scope of the Problem: Copyright piracy on the Internet, a serious problem for the past several years, has undergone explosive growth and threatens to undermine the very foundations of electronic commerce in this new millennium. In part, this is due to the increased level of access to high-speed Internet connections in many countries around the world. While broadband offers exciting prospects for the legitimate dissemination of copyrighted materials of all kinds, too often its immediate impact has been to enable online piracy by making it faster and easier to distribute unauthorized copies of sound recordings, software, videogames, literary material, and, increasingly, even motion pictures.

Prior to the advent of the Internet, pirates who engaged in wholesale infringements of copyrighted works served mostly local or regional markets, except in limited cases such as the optical media pirates in Asia and Central Europe who served global markets. The unprecedented growth of the Internet, however, coupled with

² Country surveys were prepared by Eric H. Smith, IIPA President; Steven J. Metalitz, IIPA Senior Vice President, Maria Strong; IIPA Vice President and General Counsel; Eric J. Schwartz, IIPA Vice President and Special Counsel; and Michael N. Schlesinger, IIPA Vice President and Associate General Counsel, and are based on information furnished by IIPA member associations. We also thank our law clerks, Ryan Lehning and Chris Nunes, and our staff, Pam Burchette, Melissa Braford, Michael P. Murphy, Lauren Braford and Paula Jones-Yates for their contributions to preparing, producing and distributing this submission.

increased availability of broadband connections, have provided pirates with an even more highly efficient distribution network to reach the global market. Pirates offering and distributing infringing product can now reach any part of the world with great ease, no matter where they are located. 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 no longer matter.

The Legal and Enforcement Solutions: Quantifying the economic losses due to Internet piracy, and allocating those losses to particular countries, are extremely challenging problems. Because of these challenges, IIPA's estimates of piracy levels and of trade losses due to piracy do not yet take into account piracy on the Internet. Internet piracy is growing rapidly and an urgent response is greatly needed. The adoption of adequate legislation and its effective enforcement online will promote the healthy growth of legitimate electronic commerce in copyrighted materials. We must act quickly before Internet piracy spins out of control.

IIPA recommends that USTR work with our industries to adopt a focused and comprehensive strategy to attack Internet piracy before it becomes so dominant that it can no longer be effectively controlled. The challenge is two-tiered. First, governments need to adopt stronger laws that are tailored to address online copyright piracy. Second, those laws must be vigorously enforced.

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. In particular, WTO TRIPS contains a technology neutral obligation to provide "expeditious remedies to prevent infringements and remedies which constitute a deterrent to future infringements" (Article 41). The fight against this new form of piracy must be conducted under the copyright principles contained in this Agreement, and particularly through application of the existing enforcement tools described there, accompanied by effective deterrence of this new type of illegal conduct. In addition, 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 e-commerce. Effective implementation of the WIPO Copyright Treaty (WCT) and of the WIPO Performances and Phonograms Treaty (WPPT) will help raise minimum standards of copyright protection around the world, particularly with respect to network-based delivery of copyrighted materials.

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. The first phase of these efforts – bringing the treaties into force through the accession to each of at least 30 countries – is on the verge of completion. Following is the global status of the WIPO treaties' domestic ratifications and official deposits with WIPO.³

	WIPO COPYRIGHT TREATY (WCT)	WIPO PERFORMANCES AND PHONOGRAMS TREATY (WPPT)
NUMBER OF SIGNATORIES	51	50
NUMBER OF DOMESTIC RATIFICATIONS	34	31
NUMBER OF DEPOSITS WITH WIPO (30 NEEDED TO PUT TREATIES INTO FORCE)	31	28

³ As of February 15, 2002.

These two treaties are part of the international legal standards that countries must comply with in order to provide the “adequate and effective” protections for copyright that are demanded under the Special 301 program. These standards include clarifying exclusive rights in the online world, and specifically prohibiting the production of or trafficking in tools that circumvent technological protection measures (TPMs) for copyrighted works. Ensuring that these standards are effectively embodied in national law is the heart of the critical second phase of the WIPO treaties implementation effort. Success in this phase will mean that the appropriate legal infrastructure for e-commerce in copyrighted materials is in place in all major markets.

Since the treaties were adopted, IIPA has been monitoring those countries that are amending their statutory regimes to make them compatible with their TRIPS obligations. We have encouraged these countries to bring their laws into conformity with the WIPO Internet treaties as well. If countries delay in making these needed changes, the prejudicial impact on electronic commerce and the protection of intellectual property online might become irreversible. The coming into force of the WCT and WPPT provide a powerful additional reason for countries to make the necessary legal changes now. The U.S., which has already implemented the changes to its laws needed to meet the standards of the treaties by enacting Title I of the Digital Millennium Copyright Act, should make it a priority to encourage other countries to follow this path.⁴

Second, even in the online world, there is no substitute for vigorous enforcement of new and existing laws. To protect the revenue streams and millions of new jobs created by the copyright industries, governments must become flexible and fast-moving if they want to deal with a medium that is constantly shifting and evolving. Renewed emphasis on training is vital to giving enforcement authorities the tools to quickly locate infringing Internet sites and pursue actions against the offenders who commit the most damage and/or refuse to remove the infringing content. Public education about the dangers of online infringement must be emphasized as well. As global boundaries continue to break down because of Internet growth, so must the usual lines separating the roles of industry and government in policy, enforcement and education. Close coordination will be the key to success in this challenging new environment.

REGULATION OF OPTICAL MEDIA PRODUCTION

Increasingly, all sectors of the copyright industry are using a common set of media to distribute their products worldwide. These “optical media” include formats such as compact disc (CD), video CD (VCD), CD-ROM, CD-Rs and digital versatile disc (DVD), among others. An explosion in the world’s capacity to produce optical media products has accompanied the growing demand for these products. Unfortunately, production capacity greatly exceeds legitimate demand, and much of this excess capacity is being devoted to unauthorized production. Because pirate optical media products contain the same high-quality content as legitimate products and easily cross national borders, every sector of the copyright industry is threatened by optical media piracy. Pirate CDs, VCDs, and DVDs containing protected music, sound recordings, and audiovisual works as well as pirate CD-ROMs containing tens of thousands of dollars’ worth of software, games, and literary material can quickly decimate the market for legitimate U.S. products. IIPA urges the U.S. government to be particularly attentive and creative in working with U.S. industries and foreign governments to fashion effective regulatory solutions.

The growing optical media problem confronting the copyright sector demands new and creative solutions. Traditional enforcement mechanisms have not been enough to prevent optical media piracy from spinning out of control and flooding national, regional, and even global markets with millions of high-quality pirate products. As part of each country’s TRIPS obligation to provide deterrent enforcement against piracy on a commercial scale, every country whose optical media production facilities are producing significant pirate product must consider

⁴ 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.

creating and enforcing a specialized regulatory framework for tracking the growth of optical media production capacity, including the cross-border traffic in production equipment and raw materials. This regulatory regime should also include strict licensing controls on the operation of optical media mastering and replication facilities, such as a requirement to use identification tools that flag the plant in which production occurred and that help lead the authorities to the infringer. So far such a regime has been established in China, Bulgaria, Hong Kong, and Macau; is in the process of implementation in Malaysia; and is under consideration in Thailand, Indonesia and the Philippines. Ukraine just recently adopted a system of regulatory controls as well, but we are concerned that these are flawed and we are working to address the present inadequacies. We urge the U.S. to press every country in the regions most affected by pirate optical media production and export – including East Asia, South Asia, Russia and the countries of the former Soviet Union – to put comprehensive optical media regulatory controls into place promptly. Otherwise, pirate syndicates will continue to transfer their optical media operations across borders in an effort to stay one step ahead of enforcement efforts.

Finally, even after the adoption of regulations controlling and monitoring production, it is critical that these be enforced aggressively, to accompany general copyright enforcement. Governments must be given the authority to conduct surprise inspections of optical media production facilities to ensure full compliance, and they must use that authority vigorously. Deterrent penalties – including license revocation, confiscation of equipment and raw materials, and heavy fines and imprisonment – must be consistently and efficiently imposed on optical media pirates.

PIRACY BY ORGANIZED CRIME

Copyright piracy – especially optical media piracy – is a huge and profitable business. Many pirate businesses have access to and control of large amounts of capital, exploiting complex distribution networks to engage in criminal activity of all kinds. These criminal syndicates are highly organized, are linked across national boundaries, and have powerful friends within governments. In many cases, these powerful criminal networks use copyright piracy to fund other illicit businesses, such as drug smuggling, trade in illegal munitions, money laundering, and even terrorist activities.

Increasingly, the trend is for organized pirate syndicates to move into owning or controlling optical media production facilities. These syndicates control not only the production but also the distribution of pirated and counterfeit products within the domestic market and around the world. For example, syndicates with optical media 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 media products. These criminal networks are highly sophisticated and are becoming increasingly dangerous to deal with. The entertainment software industry estimates, for example, that 99% of console piracy in Asia and elsewhere is controlled by criminal syndicates, and Russian organized crime is believed to control 75% of the world's piracy in PC-based entertainment software.

The copyright industries alone cannot fight such organized criminal activity. Company representatives and counsel have in some countries already experienced threats on their lives or physical intimidation when their investigations began to make progress. In some cases, this has prevented any enforcement activities by the private sector. This year, we report on death threats issued by optical media pirates against more than a dozen senior government enforcement officials in Malaysia. We look to additional leadership by the U.S. government, both here and in the appropriate bilateral and multilateral fora, to assist in placing the issue of effective copyright piracy enforcement on the agenda of agencies dealing with organized economic crime – generally, cybercrime, fraud, extortion, white-collar crime, drug enforcement, money laundering, and border and customs control.

IMPLEMENTATION OF THE TRIPS ENFORCEMENT TEXT

On January 1, 1996, the World Trade Organization (WTO) TRIPS Agreement entered into force for the U.S. and for all other WTO members that do not qualify for, and take advantage of, the transition periods of four and ten years.⁵ Even for WTO members that do qualify for a transition period, the national treatment and MFN provisions of TRIPS applied fully as of January 1, 1996.⁶

On January 1, 2000, all TRIPS copyright obligations, including providing effective and deterrent enforcement, entered into force for all the world's developing countries (except those classified by the U.N. as the "least" developed countries). Before 2000, many of these countries successfully amended their statutory law to bring their laws into compliance (or close to compliance) with their TRIPS obligations. However, compliance with TRIPS enforcement obligations remains sparse but is essential to returning the commercial benefits that were envisioned at the conclusion of the Uruguay Round.

Non-Compliance with TRIPS as a Matter of Performance: A good number of less developed countries simply have not taken sufficient measures to ensure that their laws and enforcement regimes (civil, criminal, provisional remedies, and border measures) are compatible with their TRIPS obligations. TRIPS obligations, both with respect to substantive law and to enforcement, are the worldwide "floor" for copyright and other intellectual property protection. Compliance with TRIPS obligations is necessary, though not alone sufficient, to meet the Special 301 statutory standard of "adequate and effective" protection.⁷ Accordingly, in the country surveys and as part of the Special 301 process itself, IIPA has paid special attention to the extent to which the countries (or territories) surveyed in this submission are in compliance with these obligations. Where TRIPS incompatibilities are found, they can appropriately be dealt with in the context of Special 301,⁸ as well as directly through the initiation of a dispute settlement proceeding in the WTO.

U.S. Government Actions in the TRIPS Copyright-Related Realm: USTR has already brought a number of successful cases in the WTO against developed countries for violations of TRIPS copyright and copyright enforcement obligations. Five of the copyright cases which the U.S. has brought have been resolved to the satisfaction of the U.S. and U.S. industry, without proceeding to a formal decision by a panel: (1) Japan, for its failure to provide 50 years of retroactive protection to U.S. sound recordings; (2) Sweden, for its failure to provide

⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Articles 65 and 66.

⁶ TRIPS, Article 65.2 provides that "any developing country Member is entitled to delay for a further period of four years [following the expiration of the one year period after the entry into force of the WTO generally] the date of application, as defined in paragraph 1 above, of the provisions of the Agreement other than Articles 3, 4 and 5 of Part I." Articles 3 and 4 establish the national treatment and MFN obligations of the Agreement and Article 5 excludes these obligations with respect to WIPO treaties. This exception to the use of transition is also provided in all other categories of countries which may take advantage thereof. As of January 1, 2002, 144 countries were members of the WTO, including all countries surveyed in this submission with the exception of Armenia, Azerbaijan, Bahamas, Belarus, Kazakhstan, Lebanon, the Russian Federation, Saudi Arabia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan, and Vietnam.

⁷ Uruguay Round Agreements Act, Pub. L. No. 103-465, § 314(c), 108 Stat. 4809 (1994) (also known as the URAA).

⁸ Indeed, in the Uruguay Round Agreements Act, Congress envisioned that TRIPS issues might be the impetus for a Priority Foreign Country designation under Special 301. Congress amended Section 304(a)(3)(A) and (B) to extend the time limit for dealing with disputes involving allegations of TRIPS violations from six months (the normal time limit in actions under Special 301) to the longer, eighteen-month period required by the WTO Dispute Settlement Understanding. 19 U.S.C. § 2414(a)(3)(A) and (B). As noted in the Statement of Administrative Action accompanying the URAA, "[t]he six-month time limit in section 304(a)(3) will continue to apply to investigations involving intellectual property and market access matters initiated as a result of a 'priority foreign country' identification where the TRIPS Agreement or another trade agreement is not involved." Uruguay Round Agreements Act Statement of Administrative Action, reprinted in H.R. Doc. No. 103-316, vol. I, at 1029 (1994).

civil *ex parte* searches; (3) Ireland, for its inadequate copyright law; (4) Greece, for its failure to enforce its laws against broadcast piracy; and (5) Denmark, for its failure to provide civil *ex parte* searches.⁹

IIPA continues to urge USTR and the U.S. government as a whole to use the Special 301 process as a leverage and consultation tool to move developing countries, whose obligations under TRIPS became fully effective on January 1, 2000, toward bringing their laws and particularly their enforcement regimes fully into compliance with TRIPS. IIPA urges USTR to use all the tools available to it, including GSP,¹⁰ CBI,¹¹ ATPA,¹² CBTPA¹³ and AGOA,¹⁴ to reach the objective of strong global copyright protection, including, as the “floor” of this protection, compliance with TRIPS. IIPA identifies TRIPS-inconsistent laws or practices in the country surveys.

IMPROVING COPYRIGHT PROTECTION AND ENFORCEMENT THROUGH FREE TRADE AGREEMENTS

The negotiation of bilateral and regional free trade agreements (FTAs) is assuming increasing importance in overall U.S. trade policy. These negotiations offer an important opportunity to persuade our trading partners to modernize their copyright law regimes so they can maximize their participation in the new e-commerce environment, and to improve enforcement procedures. Commitments to make such improvements in national law are already on the table in the Chile and Singapore FTA negotiations, and in the discussions on a Free Trade Area of the Americas (FTAA). Similar commitments should also be sought in any other FTAs that are opened for negotiation in the year to come. The FTA negotiations process could prove to be a vital tool for advancing all the objectives cited in this letter, as well as for encouraging compliance with other evolving international trends in copyright standards, such as extensions of copyright terms of protection beyond the minimum levels guaranteed by TRIPS, as has already been done in the U.S. IIPA looks forward to working closely with U.S. negotiators to achieve these goals in the FTA fora.

USE OF LEGAL SOFTWARE IN GOVERNMENT AND BUSINESSES

The Issue: The unauthorized use and copying of software by businesses and government entities — corporate and/or government “end-user” piracy in the private and public sector — result in tremendous losses to the U.S. and global economies. The great majority of the billions of dollars lost to U.S. companies from business software piracy in 2001 was attributable to this corporate/government end-user software piracy. In many nations, government entities are among the largest users of software. Thus the failure of many governments to require and to oversee legal software use within national, provincial, and local agencies results in huge revenue, job, and tax losses and tends to perpetuate a lax attitude toward intellectual property protection in the economy as a whole. This, in turn, discourages investment and innovation in the software and technology fields and stunts a nation’s

⁹ Snapshot of WTO Cases in the United States (updated Oct. 11, 2001) at <http://www.ustr.gov/enforcement/snapshot.html>. The case numbers at the WTO are: WT/DS 28 (Japan), WT/DS 86 (Sweden), WT/DS 83 (Denmark), WT/DS 125 (Greece), WT/DS 82 (Ireland).

¹⁰ Generalized System of Preferences Renewal Act of 1984, Pub. L. No. 98-573, tit. V, 99 Stat. 2948 (1984) (codified at 19 U.S.C. § 2461 et seq.).

¹¹ Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67, tit. II, 97 Stat. 369 (1983) (codified at 19 U.S.C. § 2701 et seq.).

¹² Andean Trade Preference Act of 1990, Pub. L. No. 102-182, tit. II, 105 Stat. 1233 (1991) (codified at 19 U.S.C. § 3201 et seq.).

¹³ U.S.-Caribbean Trade Partnership Act, Trade and Development Act of 2000, Pub. L. No. 106-200, tit. II (May 18, 2000) (codified at 19 U.S.C. § 2703 et seq.).

¹⁴ African Growth Opportunities Act, Trade and Development Act of 2000, Pub. L. No. 106-200, tit. I (May 18, 2000) (codified at 19 USC § 2461 et seq.).

economic potential in these critical areas. On the other hand, governments that make legal software use a priority not only comply with their international obligations to protect software copyrights but also set an example for private industry. In addition, they take an important step forward in intellectual property leadership and appropriate management of software technology, both of which are critical to active participation in the information age. The U.S. recognized the importance of government leadership in combating end-user piracy when President Clinton issued Executive Order 13103 on September 30, 1998, which required all Federal government agencies (as well as third parties who do business with government) to use only legal, authorized software. This very significant Presidential Order is currently being implemented within the U.S. government and serves as a model for other governments around the world.

Progress: In recognition that governments must lead the way in promoting legal software use, USTR and other agencies have been working with the industry and with their counterparts around the world, urging the adoption of similar Executive Order-style directives. Over 27 nations, including China, Korea, Philippines, Taiwan, Thailand, Ireland, France, Czech Republic, Spain, U.K., Greece, Hungary, Bolivia, Chile, Colombia, Paraguay, Jordan, Kuwait and Turkey have already joined the United States by issuing government legalization decrees from their top executive levels and, in so doing, have signaled their intent to become global leaders in the field of technology management.

D. IIPA RECOMMENDATIONS FOR THE 2002 SPECIAL 301 LISTS

This year IIPA has considered deficiencies in copyright protection in 51 countries and has recommended them for placement in the categories of Priority Foreign Country, Section 306 Monitoring, Priority Watch List, and Watch List. We also highlighted specific issues in 13 countries.

IIPA recommends that USTR continue to pursue its investigation and imposition of trade sanctions against Ukraine, which was designated a Priority Foreign Country last year. Ukraine has not implemented the Action Plan outlined in a joint statement issued by President Clinton and Ukrainian President Kuchma in June 2000, and the production and distribution of illegal optical media discs continues unabated. IIPA urges USTR to continue to monitor developments closely in the People's Republic of China and Paraguay under Section 306 of the Trade Act of 1974. We recommend that the remaining countries be placed on, or maintained on, the Priority Watch List or the Watch List, where they are subject to ongoing bilateral scrutiny.

IIPA recommends that 17 countries be placed on the Priority Watch List: Argentina, Brazil, Costa Rica, Dominican Republic, Egypt, India, Indonesia, Israel, Kuwait, Lebanon, Pakistan, the Philippines, the Russian Federation, South Korea, Taiwan, Turkey and Uruguay. IIPA also recommends that 31 countries be designated on the Watch List. We also recommend that out-of-cycle reviews be taken in seven countries which already appear on the various 301 lists: Colombia, Lebanon, Malaysia, the Philippines, Poland, Taiwan and Thailand.

Appendix C contains a survey of 51 countries or territories. The countries appear by recommended category and in alphabetical order within each category.

PRIORITY FOREIGN COUNTRY	SECTION 306 MONITORING	PRIORITY WATCH LIST	WATCH LIST	OTHER COUNTRIES DESERVING ADDITIONAL ATTENTION
Ukraine (GSP)	Paraguay People's Republic Of China	Argentina Brazil (GSP) Costa Rica Dominican Republic (GSP) Egypt India Indonesia Israel Kuwait Lebanon + OCR (GSP petition) Pakistan (GSP petition) Philippines + OCR Russian Federation (GSP) South Korea Taiwan + OCR Turkey (GSP) Uruguay (GSP petition)	Bolivia Bulgaria Chile CIS (10) ¹⁵ Armenia (GSP) Azerbaijan Belarus Georgia Kazakhstan (GSP) Kyrgyz Republic Moldova Tajikistan Turkmenistan Uzbekistan (GSP) Colombia + OCR Czech Republic Ecuador El Salvador Estonia Guatemala Hungary Italy Lithuania Malaysia + OCR Peru Poland + OCR Qatar Romania Saudi Arabia South Africa Thailand + OCR (GSP petition) Venezuela	Australia The Bahamas Cambodia Croatia Greece Laos Latvia Macau Macedonia Mexico Myanmar Spain Vietnam
1	2	17	31	13

Appendix D provides a history of countries appearing on IIPA and USTR lists since 1990, a year after the Special 301 legislation became effective. Fifteen of these countries have appeared on a Special 301 list each year since 1990, and fifteen are recommended by IIPA to appear there again. With the passage of the Uruguay Round Agreements Act implementing U.S. approval of the WTO Agreement, a new amendment was made to the Special 301 enabling legislation. This amendment to Section 182 of the Trade Act, dealing with identification of "priority foreign countries," provides that the U.S. Trade Representative must now 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."¹⁶ Under this criterion, these fifteen named by IIPA are particularly vulnerable, having failed to correct their piracy and/or market access problems during the decade that Special 301 has been in existence.

¹⁵ "CIS" in this filing denotes 10 former Soviet republics. Russia and Ukraine are treated separately from the CIS in this filing.

¹⁶ Uruguay Round Agreements Act Statement of Administrative Action, reprinted in H.R. Doc. No. 103-316, vol. I, at 362 (1994).

Ongoing GSP IPR Reviews: We also call attention to ongoing intellectual property rights reviews under the Generalized System of Preferences (GSP) trade program. In June 1999, IIPA filed eleven GSP petitions against: Poland, Peru, Lebanon, Dominican Republic, Ukraine, Moldova, Uzbekistan, Armenia, Kazakhstan, Belarus, and the Kyrgyz Republic. Since that time, Congress renewed the GSP program through September 30, 2001 and the U.S. government commenced consideration of whether to grant these petitions. On February 7, 2000, IIPA withdrew its petition against Peru in light of the commitments made by that country to improve enforcement. On February 14, 2000, USTR initiated GSP IPR reviews against six countries: Dominican Republic, Ukraine, Moldova, Uzbekistan, Armenia, and Kazakhstan. Our Belarus petition was not accepted because GSP benefits were being withdrawn from that country for other reasons. Hearings were held on May 12, 2000.

In August 2000, IIPA filed five petitions for GSP reviews of the IPR practices of five countries (Brazil, Russia, Guatemala, Costa Rica, and Uruguay) as part of the 2000 Annual Review. On January 10, 2001, USTR decided to initiate GSP IPR reviews against Brazil and the Russian Federation. GSP hearings were held on March 9, 2001 in Washington, D.C. USTR also announced that it was terminating the GSP review against Moldova due to legislative progress recently made in that country. For the 2001 GSP Annual Review process, IIPA filed GSP petitions against Lebanon, Pakistan and Uruguay. A coalition of six copyright-based associations also submitted a petition against Thailand. These four 2001 GSP IPR petitions remain pending before USTR; no decision on their acceptance or denial has yet been made as of the submission of this Special 301 filing.

E. COUNTRIES DESERVING ADDITIONAL ATTENTION IN 2002

In addition to the 51 countries which IIPA has provided comprehensive country reports, IIPA highlights issues in 13 countries for which there are no surveys in Appendix C. Thirteen of these countries deserve attention in bilateral efforts during the year. IIPA mentions the Macau Special Administrative Region to commend the government there for the successful handling of the optical media piracy problem that plagued the peninsula for several years. We split these 13 countries into two categories: optical media issues or concerns and other bilateral concerns.

Bilateral Concerns

Australia: The House Standing Committee on Legal and Constitutional Affairs conducted an inquiry into copyright enforcement upon the Attorney General's request and on December 4, 2000 presented its report to the House and to the Attorney General. The recommendations include:

- i. making corporate end-user piracy a criminal offense;
- ii. introducing a system of statutory damages;
- iii. introducing a presumption of copyright ownership in civil and criminal proceedings; and
- iv. introducing guideline judgments in relation to copyright offenses.

The government has yet to release its response to these recommendations. IIPA urges the Australian government to accept these recommendations and to institute them in 2002.

The Attorney General requested the Copyright Law Review Commission to conduct an inquiry into the relationship between copyright law and contract law. The Issues Paper states that, "licenses to use copyright works...may contain clauses that purport to exclude or modify the statutory exceptions to copyright infringement," and that the main questions before the Commission are "the extent to which this occurs and should be permissible." The Commission is also examining mass marketing agreements used to grant access to copyright material. IIPA filed a submission to the Commission emphasizing the importance of licensing to the protection of copyright industries. The Commission is expected to issue its report to the Attorney General on April 30. The Attorney General will then determine whether to make the report public and what, if any, action to take.

The Bahamas: The Bahamas has made very little progress in meeting the commitments it undertook in an exchange of letters between its government and the U.S. government dated October 26 and November 9, 2000, or to implement its commitments contained in a letter of April 2000. These series of commitments involve the need for legal and regulatory reform of the Bahamas' copyright law and regulations which created an overbroad compulsory license for unauthorized re-transmission by cable television systems of any copyrighted work transmitted over its territory, including encrypted transmissions. Such provisions violate the Bahamas' obligations under the Berne Convention. Bahamas' efforts to amend the copyright law, address remaining problems in its regulations, and engage rightsholders in the regulatory process have not resulted in concrete action to satisfy its bilateral commitments. Therefore, the Motion Picture Association of America (MPAA) will be filing a Section 301 action against the Bahamas for violation of a trade agreement.

Croatia. The lack of effective and sustained enforcement activities is a concern in Croatia, particularly for the business software and entertainment (videogame) software industries. The level of piracy experienced by these industries remains at an unacceptably high level: for example, the piracy rate for business software was 63% in 2000 (2001 figures are not yet available). With respect to business software, the Business Software Alliance (BSA) reports considerable delay before undertaking criminal raids. The police have acted in only about 40% of the cases brought to them by BSA; many of these requests for action have been pending for over a year. All the copyright industries report the police lack sufficient resources, as well as the appropriate equipment and expertise to effectively conduct their enforcement efforts, even while maintaining good relations with the industries. For example, the Ministry of Interior's decision to suspend its anti-piracy program in 1997 reduced government resources and led to a noticeable increase in video piracy according to the MPAA. On a positive note, in January 2002, that same Ministry announced the creation of a special police unit for computer crime and intellectual property protection within the Ministry of Interior. The software industry reports that the State Inspectorate (market police) did act on referrals from industry in a timely manner, but coordination between the State Inspectorate and police is minimal, leading to cases that are never acted upon or never properly prosecuted under Croatian law. Civil injunctions often take longer than six months to be issued, as compared to three days to three weeks for the rest of Central Europe on average. The absence of effective border enforcement has hurt all of the copyright industries; the proper legislation was never adopted as required under TRIPS, so actual enforcement at the borders has been non-existent. It is hoped that effective border enforcement legislation will be enacted early in 2002; there are also revisions to the copyright law moving forward which need to be closely monitored, especially for WIPO digital treaty compliance.

Greece: IIPA continues to commend Greece for taking actions against broadcast piracy, reducing it to around 5%, following conclusion of the TRIPS case. Nevertheless, Greece continues to have the highest piracy rates in Western Europe. The entertainment software industry is particularly concerned by a piracy rate of 85%, with CD-R burning of games, and their marketing over the Internet and in small shops, being the major problem. Most industries are reporting better police cooperation and increased cooperation of the tax authorities. BSA is pleased with the results it has been getting in its civil end-user piracy cases, especially through its use of civil search remedy provisions, and is also pleased with the government's recent efforts to combat online piracy. Overall, lack of deterrent penalties imposed on pirates and relatively inefficient court systems are holding Greece back from reducing its piracy rates.

Latvia: In the mid-1990s, Latvia made significant progress with copyright legal reforms, but it continues to lag behind other countries in the region in terms of actual progress with on-the-ground enforcement. Latvia still needs to improve its Criminal Code and Criminal Procedure Code, to add *ex parte* search provisions into its Civil Code, and to implement its Customs Code and regulations (now over two years old) so that effective border and internal enforcement actions can be undertaken in compliance with TRIPS. Latvia continues to struggle to make its copyright enforcement regime effective with proper criminal, civil, administrative and border action. The copyright industries continue to report high piracy rates as a result of this poor enforcement activity. The enforcement problems include insufficient financial and human resources for the Economic Police to carry out

effective seizures of material, and Municipal Police that are ill-prepared for street raids at open city markets, kiosks and supermarkets selling all forms of illegal copyright material (music, business and entertainment software, and audiovisual material). There is also reportedly poor cooperation with the prosecutors in moving cases forward, as well as numerous evidentiary and other bureaucratic obstacles that must be overcome. A major weakness in the enforcement regime remains the lack of effective border enforcement, especially the failure of customs officials to commence actions without court order and the need for these officials to target materials trans-shipped through (and stored in) Latvia for other territories.

Macedonia: Copyright enforcement is particularly weak in Macedonia according to all of the copyright industries active there. This should be considered for serious discussion by the U.S. government as Macedonia moves toward WTO accession (possibly in 2002). High levels of piracy, for example, in the business software sector are reported including widespread use of unlicensed software within government agencies. The police, prosecutors, and the customs officials lack the necessary equipment and expertise to conduct raids, investigations, and to commence cases against copyright infringers. Nevertheless, the police recently started to take action, for example, against software pirates. In 2001, the Business Software Alliance (BSA) reported the first three raids undertaken by the police. In contrast, the Copyright Inspectorate (which can only take administrative enforcement actions) has failed to refer cases that merit criminal investigation to the police and prosecutors. In addition, the State Market Inspectorate does not even have the authority to enforce the copyright law, thus burdening the already scarce police resources. Customs authorities do not take the necessary actions to prevent transshipment of pirated products across the borders, in particular along the borders with Kosovo and Bulgaria. The software industry reports that it is very rare for courts to issue injunctions in criminal cases, even though provisions providing for such action are found in the Copyright Law. Severe delays, and the issuance of only minimal fines rather than deterrent prison sentences in IPR cases, continue to plague the Macedonian court system.

Mexico: See discussion above on page 1.

Spain: Spain has among the highest piracy rates in Europe for business software (more than one in every two copies is pirated). The recording industry also reports that piracy levels in Spain have skyrocketed over the last year. There have been some improvements in business software cases in 2001, including a successful nationwide police sweep against pirate resellers (police have indicated an interest in conducting a similar sweep on Internet pirates), the courts' issuance of several positive civil damage awards, and the Government's adoption of a software asset management plan (albeit a weak one). Unfortunately, the deterrent effect of these important activities continues to be undermined by significant judicial delays in civil and criminal proceedings. These delays remain among the longest in the EU. Although courts are moving more quickly than in the past, it can still take weeks or even months to get a civil *ex parte* search application granted (a process that takes days in most EU markets) – at which point the evidence is stale and the raid is untenable. And proceedings on the merits often take years, leading pirates to recognize that there will be no immediate consequences to their illegal acts. Also problematic, Spain's proposed legislation to implement the E-Commerce Directive's liability rules on hosting omits the Directive's constructive knowledge element, and instead suggests that service providers must take action only when they are made "aware" by a court that they are hosting illegal content. Right holders have repeatedly invited the Spanish government to fix this flaw and to implement the Directive faithfully, but without much success to date."

2. Optical Media

Cambodia. Reportedly one pirate optical disc plant containing two production lines has relocated to Cambodia, which is not a member of the WTO, the Berne Convention, or the WIPO digital treaties. Currently Cambodia has neither an adequate copyright law nor enforcement mechanisms (or other regulatory schemes) in place to control the production, distribution, and importation of pirate optical media product or the raw materials for producing pirate product.

Laos. Reportedly two pirate optical disc plants containing two production lines have relocated to Laos from other Asian territories, such as Hong Kong. At the same time, Laos is not a member of the WTO, Berne

Convention, and WIPO digital treaties and currently has no copyright law to even begin to combat the problem. As a result, because there is no protection or enforcement for US works, the market for legitimate US copyrighted works in Laos is nonexistent.

Macau: In a relatively short period of time, the government of Macau SAR has managed to virtually rid the peninsula of pirate production of optical media product. As of February 2002, most of the once-bustling optical disc factories have either been sealed or moved out from Macau (and neighboring islands that together make up Macau SAR). Raids, seizures and arrests throughout 2000 and again in 2001 led to favorable court judgments imposed on commercial pirate producers and distributors, massive seizures of pirated product destined for export, and forfeiture of equipment used to produce such contraband. By these actions, the Macau government has demonstrated the willingness to effectively seize and destroy the tools of piracy. Today, only one optical disc replicating factory and three mastering factories are still active. Nonetheless, the government must remain vigilant, as, for example, it is still believed that some of the pirated DVD and VCD stampers and pirated CDs and VCDs presently flowing into China are from factories located in Macau. The copyright industries look forward to working with the recently appointed Commissioner of Customs (the Macau Customs agency was newly established in November 2001), in continuing the fine work that has been accomplished by the Economic Services and Marine & Customs Police to date.

Myanmar (Burma). Reportedly four pirate optical disc plants containing six production lines have relocated to Burma, perhaps from Malaysia. This is a serious development, since Burma has failed to update its copyright law (a version of the 1911 colonial British law is still in effect) or join any of the international copyright treaties or conventions. Although courts do occasionally decide copyright cases, the current law is inadequate and enforcement is virtually nonexistent. As a result, there is no protection at all for U.S. copyrighted materials in Burma.

Vietnam: IIPA applauds the recent entry into force of a Bilateral Trade Agreement between the U.S. and Vietnam, and notes that, as a result, Vietnam will probably be the focus of increased attention from U.S. trade officials this year. Although creative works of U.S. copyright owners have been officially protected in Vietnam ever since the 1998 bilateral copyright agreement, in practice the market remains dominated by piracy and largely closed to legitimate distribution of U.S. works. Besides working to dismantle market access barriers for U.S. copyright industries, U.S. efforts should seek to build up Vietnam's institutional capacity to enforce its copyright laws. Thus far, Vietnam has been able to forestall any large-scale movement of pirate optical media production facilities into its territory. It must be encouraged to continue and increase its vigilance in this regard, lest it become the next destination of choice for pirate syndicates that are fleeing intensified enforcement policies in some of its ASEAN neighbors

F. ESTIMATED LOSSES DUE TO PIRACY

As a result of the deficiencies in the copyright regimes of these 51 countries for which losses have been estimated, the U.S. copyright-based industries suffered estimated trade losses due to piracy of nearly \$8,380 billion in 2001.

Appendix A presents a chart quantifying these losses for the five copyright-based industry sectors – the business applications, entertainment software, motion picture, sound recording and music, and book publishing industries – for 2000 and 2001. In each survey, IIPA has described the piracy levels in each of these countries (where available). In many surveys, estimated piracy losses and levels are listed for the last six years, from 1996 through 2001. 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.

**ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY
IN 51 SELECTED COUNTRIES IN 2001 (in millions of U.S. Dollars)**

Industry	Estimated Losses
Motion Pictures	1,288.0
Sound Recordings and Musical Compositions	2,034.7
Business Software Applications	2,653.5
Entertainment Software	1,767.1
Books	636.4
Total	8,379.7

Appendix B summarizes each methodology used by IIPA member associations to calculate these estimated losses. These losses are a crushing burden on the U.S. economy, on U.S. job growth, and on world trade generally. They result from the blatant theft of one of this country's most valuable trade assets – its cultural and technological creativity.

G. CONCLUSION

Special 301 remains a cornerstone of U.S. intellectual property and trade policy. We urge the Administration to use Special 301, as well as the tools available under the GSP, CBI, ATPA, CBTPA, and AGOA programs, to encourage the countries identified in our recommendations this year to make the political commitments, followed by the necessary concrete actions, to bring their copyright and enforcement regimes up to international standards. The U.S. government should also use the multilateral tools in the WTO's dispute settlement machinery to encourage countries to bring their substantive and enforcement regimes into compliance with their international obligations under TRIPS. 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,



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