



February 14, 2003

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"), 67 Fed. Reg.  
79683 (Dec. 30, 2002)

Dear Mr. Papovich:

This filing responds to the Request for Written Submissions appearing on December 30, 2002 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 56 separate country reports. We also highlight six initiatives in this letter, and identify seven countries that we have not recommended be on a Special 301 list but which merit ongoing attention by the U.S. government.

**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, DVDs 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 April 2002, the IIPA released an economic report entitled Copyright Industries in the U.S. Economy: The 2002 Report, the ninth 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 industries<sup>1</sup> accounted for 5.24% of U.S. GDP or \$535.1 billion in value-added in 2001. In the last 24 years (1977-2001), the core copyright industries' share of GDP grew at an annual rate more than twice as fast as the remainder of the economy (7.0% vs. 3.0%). Also over these 24 years, employment in the core copyright industries more than doubled to 4.7 million workers (3.5% 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. 1.5%). In 2001, the U.S. copyright industries achieved foreign sales and exports of \$88.97 billion, a 9.4% gain from the prior year. The copyright industries' foreign sales and exports continue to be larger than 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. This protection upon which so much U.S. economic performance rests is under constantly evolving threats, and it is critical to sustaining U.S. economic competitiveness that our response remains flexible, innovative and committed. There are certain sectors of the U.S. copyright community, notably the music sector, that are already witnessing significant declines in foreign sales as a consequence of increased levels and new forms of piracy, and it is essential that we address these problems on an urgent basis.

## **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 also 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 2003; (2) summarizes our submission this year; and (3) points the reader to various appendices.
- 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;
- Appendix C, which includes all the country surveys<sup>2</sup> and at the end lists seven countries that deserve continued U.S. government attention but which have not been placed on the Special 301 lists.
- Appendix D, which provides a historical chart of countries' placement on Special 301 lists by USTR since 1990; and

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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.

<sup>2</sup> 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 Lehnig and David Johnstone, and our staff, Pam Burchette, Melissa Braford, Michael P. Murphy, and Lauren Braford for their contributions in preparing, producing and distributing this submission.

- Appendix E, which contains the Special 301 histories of the countries that appear as our recommendations this year, and many other countries that have appeared on USTR's lists in the past and are still candidates for monitoring intellectual property practices.

**C. COPYRIGHT INDUSTRIES' INITIATIVES AND CHALLENGES IN 2003**

Improving copyright 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 two decades 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, and in many respects, growing, threats in the 21st century. These threats, emanating largely from the growth of digital and on-line technology and the increased organization of commercial pirates, require a renewed commitment to use both the old and new tools available to industry and governments.

In our last four Special 301 filings, IIPA outlined a series of challenges facing the copyright-based industries. This year, we have updated these priorities, but they remain essentially unchanged from 2002.

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.

**OPTICAL DISC PIRACY AND ITS EFFECTIVE REGULATION**

Piracy of optical disc products today (along with corporate end-user piracy of business software) causes the greatest losses to the copyright industries and pose the greatest threats to them. Increasingly, all sectors of the copyright industry are using 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-Rs and digital versatile discs (DVD). An explosion in the world's capacity to produce optical disc 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 disc 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 disc 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.

The growth in the number and capacity of optical disc factories around the globe has been staggering. The following chart details that growth in selected countries. It is noteworthy that the greatest optical disc piracy threat is in Asia and Russia which have shown the fastest growth in the number of plants and production lines.

PLANTS (Excluding CD-R)		PRODUCTION LINES		CAPACITY IN MILLIONS
2002	1999	2002	1999	2002

<b>ASIA</b>					
Australia	9	12	19	13	66.5
Cambodia	1		2		7
China	70	72	196	156	686
Hong Kong	93	94	554	414	1939
India	9	8	14	8	49
Indonesia	19	12	36	16	126
Japan	34	34	66	62	231
Korea	31	24	96	28	336
Laos	2	2	2	2	7
Macau	7	26	6	31	21
Malaysia	38	32	86	41	301
Myanmar/Burma	2	4	4	6	14
Pakistan	5	5	12	5	66
Philippines	9	5	23	7	80.5
Singapore	15	17	29	29	101.5
Taiwan	61	41	283	239	1127
Thailand	51	20	102	56	357
Vietnam	2	3	2	3	7
<b>SUB-TOTAL</b>	<b>458</b>	<b>411</b>	<b>1532</b>	<b>1116</b>	<b>5522.5</b>
<b>E. EUROPE/CIS</b>					
Bulgaria	7		9		
Czech Republic	4		24		200
Hungary	2		2		
Kazakhstan	1		1		
Lithuania	1		1		8
Poland	11		49		316
Romania	1		1		10
Russia	26		50		
Ukraine	3		8		30
<b>SUB-TOTAL</b>	<b>56</b>		<b>145</b>		<b>564</b>
<b>W. EUROPE</b>					
Greece	11		11		88
Italy	29		57		459
<b>SUB-TOTAL</b>	<b>40</b>		<b>68</b>		<b>547</b>
<b>LATIN AMERICA</b>					
Argentina	16		31		119.9
Brazil	9		11		453
Chile	2		2		18.7
Columbia	3		10		48
Dominican Rep.	1		1		6.7
Mexico	14		49		295.5
Peru	3		5		16.7
Venezuela	3		4		40
<b>SUB-TOTAL</b>	<b>51</b>		<b>113</b>		<b>998.5</b>
<b>MIDDLE EAST</b>					
Egypt	6		6		25
Israel	7		18		89
Lebanon	1		1		6.7
Saudi Arabia	1		1		20
Syria	1		1		3.5
Turkey	8		18		63
<b>SUB-TOTAL</b>	<b>24</b>		<b>45</b>		<b>207.2</b>
<b>AFRICA</b>					
South Africa	3		7		49
<b>SUB-TOTAL</b>	<b>3</b>		<b>7</b>		<b>49</b>
<b>TOTALS</b>	<b>632</b>		<b>1910</b>		<b>7888.2</b>

The growing optical disc problem confronting the copyright sector demands new and creative solutions. Traditional enforcement mechanisms have not been sufficient to prevent optical disc 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 WTO TRIPS obligation to provide deterrent enforcement against piracy on a commercial scale, every country whose optical disc production facilities are producing significant pirate product must consider creating and enforcing a specialized regulatory framework for tracking the growth of optical disc 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 disc 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 regimes have been established in China, Bulgaria, Hong Kong, Malaysia, Taiwan and Macau, and are under consideration in Thailand, Indonesia and the Philippines. Ukraine has adopted a system of regulatory controls as well, but this law is flawed and must be corrected.<sup>3</sup> Increasingly, pirate optical disc production is migrating from these jurisdictions to new countries that as yet have not adopted these regulatory tools to control this problem. These countries include Russia, Pakistan, India, Thailand, the Philippines and Vietnam and others mentioned in this submission. We urge the U.S. to press every country in the regions most affected by pirate optical disc production and export—including East Asia, South Asia, Russia and the countries of the former Soviet Union—to put comprehensive optical disc regulatory controls into place promptly. Otherwise, pirate syndicates will continue to transfer their optical disc operations across borders in an effort to stay one step ahead of enforcement efforts.

IIPA and its members have produced a model "template" for an effective optical disc law. In addition, we have produced a paper spelling out the "key elements" of such a law, designed for policy makers and legislators. These papers have the full support of all the copyright industries and should be carefully studied by all governments that are experiencing growing pirate optical disc production. IIPA and its members stand ready to assist governments in understanding, drafting and implementing these recommendations into national law.

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 disc 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 disc pirates.

### **PIRACY BY ORGANIZED CRIME**

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 have access to and control of large amounts of capital, exploiting complex distribution networks to engage in criminal activity of all kinds. 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, in some cases, even terrorist activities.

These syndicates control not only the production but also the distribution of pirated and counterfeit optical disc products within the domestic market and around the world. 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,

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<sup>3</sup> As a consequence, the U.S. government has levied sanctions against Ukraine under Special 301 and removed its GSP benefits. Such sanctions remain in place today.

and other optical disc products. These criminal networks are highly sophisticated and are becoming increasingly dangerous to deal with.

In a recent article in Time Europe,<sup>4</sup> it was pointed out that a drug dealer pays about \$47,000 for a kilo of cocaine, and can sell it on the street for about \$94,000, a 100% profit. But for \$47,000 and with a lot less risk, a pirate can buy or produce 1,500 pirated copies of Microsoft's Office 2000 Professional and resell them for a profit of 900%! Examples of the involvement of organized crime on a global basis include:

- In March 2002, the largest seizure ever in **Australia** took place—35,000 pirate VCDs and DVDs. The disks were produced in **Malaysia** and a Malaysian national was arrested at the time. Further investigation led to the arrest of another Malaysian entering Australia with false documents. The authorities determined that this was a well-organized syndicate including Malaysian and Australian nationals operating in cell type structures to protect the ultimate kingpins. Unfortunately, both suspects were assessed inadequate fines, and merely deported without requiring the fine to be paid.
- In **Hong Kong** in February 1999, the Anti-Triad Squad of the Hong Kong Police raided a pirate and pornographic disc-packaging center suspected of being under the control of the triad group "Wo Sing Wo." Approximately 150,000 pirate discs worth more than HK\$3 million (US\$384,000) were seized and three men arrested. Several shopping arcades in Tsuen Wan, which had pirate discs on sale, were under the direct control and protection of this triad organization. As confirmed by the officer-in-charge of the Anti-Triad Squad, the three men arrested were all members of Wo Sing Wo.
- In **Macau** in July 2000, a raid against "Sun Fat Chin" resulted in uncovering an optical disc factory. All production equipment was seized. In October 2001, when Macau authorities returned to inspect the sealed factory, it found that all the equipment had been secretly removed. Enforcement sources later confirmed that a notorious senior triad member "Broken Tooth," at that time in prison, controlled the factory.
- In July 2001 in **Malaysia**, suspected as a center of organized piracy in Asia, a City Council President received a personal death threat along with a threat to rape his daughter if he continued his crackdown on the city's illegal VCD traders. He also received a handwritten letter containing a 10cm long razor blade. Newspaper reports cited that there had been seven death threats reported to the police in the months following aggressive action by the enforcement officers against VCD pirates. The Minister of the Domestic Trade and Consumer Affairs Ministry (MDTCA)—the main enforcement arm in Malaysia—also received a personal death threat. The Deputy Prime Minister stated publicly that it was clear that piracy is linked to criminal elements in Malaysia.

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<sup>4</sup> "Busting Software Pirates" Time/Europe, November 18, 2002.

- Also in **Malaysia**, the police reported in October 2002 that pirate production of thousands of copies of protected films was now being carried out aboard ships anchored in international waters off the Malaysian coast. The ships later offloaded their cargo at obscure points along the coast. An investigation is continuing into this new, troubling method, of piracy.
- A raid in **Taiwan** in May 2001 turned up several illegal firearms along with 70,000 suspect CD-Rs and other optical disc products containing music and pornography. This led to the discovery of an illegal arms factory alongside a sophisticated CD-R facility.
- In September 2002, in central **Taiwan**, the police arrested a 19-year-old in connection with the production of firearms to equip gang members protecting the local marketplace of a pirate optical disc production syndicate.
- In **Hungary**, criminal syndicates are assuming control of illegal CD-R burning, as well as all other aspects of duplication and distribution of entertainment software. For example, these criminal groups are using the Petöfi Stadium, which belongs to the local municipality, as a distribution point to supply the surrounding region, including into Germany.
- In **Poland**, criminal syndicates have now taken over not only distribution in the infamous Warsaw Stadium, but also the surrounding countryside. Because of their absolute control of the market, the syndicates are then able to price their pirate entertainment software, for example, at exactly PL20 (US\$5.00) with absolutely no deviations . . . whether sold in the stadium or other areas in Warsaw, Gdansk, Katowice or Poznan.
- Distribution of pirated entertainment software product (especially manufactured discs produced in Russia) in **Lithuania** is controlled by Russian organized crime syndicates that are now affixing their own logos and brand names to their illicit products. These pirated materials are then stored in Lithuania for distribution locally and throughout Eastern and Central Europe.
- CDs carrying extremist propaganda found in **Argentina, Mauritius, Pakistan and Paraguay** have been demonstrated to come from the same source as much of the illegally-produced music in these regions. Other extremist or terrorist groups, for example in **Northern Ireland**, are partly funded by music piracy.
- In **Mexico** in October 2001, police discovered a massive CD-R operation in raids on eleven houses, three linked internally. Over one million blank CD-Rs, half a million pirated CD-Rs and 235 CD burners were found. It is believed the profits were invested in narcotics and prostitution.

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 activity by the private sector. 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.

## **INTERNET PIRACY, ELECTRONIC COMMERCE, 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 disc pirates in Asia and Central Europe who served global markets. The unprecedented growth of the Internet, however, coupled with 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 and on a global basis to secure the adoption of legal provisions that will prevent piracy and create a legal and regulatory environment that will facilitate the growth of legitimate on-line delivery of copyrighted materials.

IIPA recommends that USTR work with our industries to adopt a focused and comprehensive strategy to attack Internet piracy. 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. These treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) are now in force and their effective implementation is critical in the fight to control this new and ominous threat.

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—was completed in 2002. More and more countries are now beginning to legislate in this area. Following is the global status of the official deposits of the treaties with WIPO:<sup>5</sup>

	<b>WIPO COPYRIGHT TREATY (WCT)</b>	<b>WIPO PERFORMANCES AND PHONOGRAMS TREATY (WPPT)</b>
<b>NUMBER OF SIGNATORIES</b>	<b>51</b>	<b>50</b>
<b>NUMBER OF DEPOSITS WITH WIPO</b>	<b>40</b>	<b>39</b>

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 provides 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 (DMCA), should continue to make it a priority to encourage other countries to follow this path.<sup>6</sup>

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. We also mention that efforts should be undertaken to encourage global adoption of the Cybercrime Convention, which requires countries to adopt effective remedies for on-line copyright infringement, and which facilitates law enforcement cooperation across borders—something that needs to develop if we are going to be successful in addressing this pressing problem.

#### **IMPLEMENTATION OF THE TRIPS ENFORCEMENT TEXT**

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<sup>5</sup> As of February 14, 2003.

<sup>6</sup> 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.

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.<sup>7</sup> 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.<sup>8</sup>

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 laws to bring them into compliance (or close to compliance) with TRIPS obligations. However, compliance with TRIPS enforcement obligations remains sparse but essential to returning the commercial benefits that were envisioned at the conclusion of the Uruguay Round.

**Non-Compliance with TRIPS "Performance" Requirements:** 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.<sup>9</sup> 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,<sup>10</sup> as well as directly through the initiation of a dispute settlement proceeding in the WTO.

All countries must acknowledge that the TRIPS enforcement text requires effective enforcement against all types of infringements and particularly copyright piracy on a commercial scale. This includes not only the new forms of piracy discussed throughout this submission, such as piracy of movies, records and music, entertainment and business software and books and journals on optical disc formats and on, or involving, the Internet, but piracy of works in traditional formats, such as movies on VHS tapes, as well as broadcast/cable/satellite piracy

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<sup>7</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Articles 65 and 66.

<sup>8</sup> 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 that may take advantage thereof. As of February 3, 2003, 145 countries were members of the WTO, including all countries surveyed in this submission with the exception of Azerbaijan, Bahamas, Belarus, Kazakhstan, Lebanon, the Russian Federation, Saudi Arabia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan.

<sup>9</sup> Uruguay Round Agreements Act, Pub. L. No. 103-465, § 314(c), 108 Stat. 4809 (1994) (also known as the URAA).

<sup>10</sup> 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).

and unauthorized public performances, music on audiocassette, entertainment software in cartridge format and traditional textbook, tradebook and journal offset printing piracy, as well as commercial photocopying.

**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 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.<sup>11</sup>

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,<sup>12</sup> CBI,<sup>13</sup> CBTPA,<sup>14</sup> ATPA,<sup>15</sup> ATPDEA,<sup>16</sup> and AGOA,<sup>17</sup> 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) has assumed overriding importance in recent 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. At the end of 2002, the negotiations with Singapore and Chile concluded with positive results, particularly the agreement with Singapore, namely with significantly higher levels of protection and enforcement, including full and proper implementation of the WIPO Internet Treaties. These agreements will now set new global precedents – which we expect to be adopted in the four new FTA negotiations to begin in the spring of 2003, with the Central American countries, with Morocco, with Australia and with South

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<sup>11</sup> 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).

<sup>12</sup> 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.*).

<sup>13</sup> 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.*).

<sup>14</sup> 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.*).

<sup>15</sup> 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.*).

<sup>16</sup> Andean Trade Promotion and Drug Eradication Act, Pub. L. No. 107-210 (2002) (codified at 19 U.S.C. § 3201 *et seq.*).

<sup>17</sup> 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.*).

Africa and its South African Customs Union (SACU) neighbors. Other FTAs are likely to follow. We compliment the Administration for moving swiftly and aggressively to secure new high levels of protection and enforcement that will be critical to the development of e-commerce in the coming years. Finally, we next expect all this effort to come together in an unprecedented Free Trade Agreement of the Americas with standards of copyright protection enforcement that will truly set the new global framework for years to come. IIPA looks forward to working closely with U.S. negotiators to achieve these goals in the FTA and FTAA fora.

### **CORPORATE END-USER PIRACY OF SOFTWARE AND USE OF LEGAL SOFTWARE IN GOVERNMENT**

**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. software companies from business software piracy in 2002 was attributable to this corporate/government end-user software piracy. In many nations, government entities are among the largest users of software.

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, it is critical that countries provide an effective civil system of enforcement, provisional remedies to preserve evidence, extensive customs procedures to stop infringing goods at the border, 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 resulted in deterrent criminal fines and jail terms. Additionally, most countries still do not criminalize corporate end-user piracy or provide civil *ex parte* measures—both in violation of their TRIPS obligations.

Moreover, 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 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. 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, the 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 2003 SPECIAL 301 LISTS**

This year IIPA has considered deficiencies in copyright protection in 56 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 7 countries.

IIPA recommends that USTR should keep Ukraine as a Priority Foreign Country (PFC) and that trade sanctions continue accordingly in 2003. This includes the continued suspension of Ukraine's duty-free trade benefits under the Generalized System of Preferences ("GSP"); those benefits were suspended in August 2001 for Ukraine's copyright shortcomings. We make these recommendations because Ukraine's copyright piracy problem remains very serious almost three years after it agreed to a Joint Action Plan signed by then-President Clinton and President Kuchma that Ukraine has neither effectively nor completely implemented.

By its failure to fully implement an optical disc regulatory scheme and by its overall criminal enforcement failures, Ukraine is not in compliance with the June 2000 bilateral agreement nor with the 1992 Bilateral NTR Trade Agreement with the United States (which Ukraine agreed to implement by December 31, 1993). Also, Ukraine's overall copyright law and enforcement regime falls far short of compliance with WTO TRIPS obligations. Ukraine should be prevented from accession to the WTO until it is in complete compliance.

IIPA urges USTR to continue to monitor developments closely in the People's Republic of China 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 21 countries be placed on the Priority Watch List: Argentina, The Bahamas, Bolivia, Brazil, Dominican Republic, Egypt, India, Indonesia, Israel, Kuwait, Lebanon, Lithuania, Pakistan, Paraguay, the Philippines, Poland, the Russian Federation, South Africa, South Korea, Taiwan, and Thailand. IIPA also recommends that 33 countries be designated on the Watch List. We also recommend that out-of-cycle reviews be taken in five countries that already appear on the various 301 lists: Lebanon, Malaysia, the Philippines, the Russian Federation, and South Korea.

Appendix C contains a survey of 56 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)	People's Republic of China	Argentina Bahamas Bolivia Brazil (GSP) Dominican Republic (GSP) Egypt India Indonesia Israel Kuwait Lebanon +OCR (GSP petition pending) Lithuania Pakistan (GSP petition pending) Paraguay Philippines + OCR Poland Russian Federation + OCR (GSP) South Africa South Korea + OCR Taiwan Thailand (GSP petition pending)	Bangladesh Bulgaria Chile CIS (10) <sup>18</sup> Armenia (GSP) Azerbaijan Belarus Georgia Kazakhstan (GSP) Kyrgyz Republic Moldova Tajikistan Turkmenistan Uzbekistan (GSP) Colombia Costa Rica Czech Republic Ecuador Estonia Guatemala Hungary Italy Kenya Latvia Malaysia +OCR Peru Qatar Romania Saudi Arabia Serbia & Montenegro Sri Lanka Turkey (GSP) Uruguay (GSP petition pending) Venezuela	Cambodia Croatia Laos Macedonia Myanmar (Burma) Spain Vietnam
<b>1</b>	<b>1</b>	<b>21</b>	<b>33</b>	<b>7</b>

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 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>19</sup> Under this criterion, these fifteen countries named by IIPA are particularly vulnerable, having failed to correct their piracy and/or market access problems during the 15 years that Special 301 has been in existence.

<sup>18</sup> "CIS" in this filing denotes ten former Soviet republics. Russia and Ukraine are treated separately from the CIS in this filing.

<sup>19</sup> 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. After Congress renewed the GSP program through September 30, 2001, 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 accepted IIPA's GSP petitions 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 on these six countries 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 active and pending before USTR. On August 6, 2002, the GSP program was renewed for four years through December 31, 2006. At the time of this Special 301 submission USTR is considering action on the 2000 petitions already accepted and considering whether to accept IIPA's 2001 GSP petitions.

IIPA urges acceptance of our outstanding petitions based on these countries' failure to meet the conditions established under GSP, and we call for a quick resumption of the investigations of Brazil and Russia. In Brazil, we believe that the new Administration should be given an opportunity to resolve a problem that it inherited but was not of its own making, but we encourage the U.S. government to quickly reach out to the Lula Administration so that it is immediately aware of the political and economic stakes associated with its success or failure. In Russia, while there have been some encouraging signals, the government has taken little meaningful action to address the growing problem of optical disc production, and we call upon USTR and the GSP Committee to recommence the investigation with vigor.

#### **E. COUNTRIES DESERVING SPECIAL MENTION IN 2003**

In addition to the 56 countries for which IIPA has provided comprehensive country reports, IIPA also highlights issues in seven countries which deserve special attention this year but which are not recommended for placement on the Special 301 Lists. These countries and the problems encountered in them can be found at the end of Appendix C in a new Section entitled "Countries Deserving of Special Mention in 2003." These countries are: Cambodia, Croatia, Laos, Macedonia, Myanmar, Spain and Vietnam.

#### **F. ESTIMATED LOSSES DUE TO PIRACY**

As a result of the deficiencies in the copyright regimes of the 56 countries for which losses have been estimated, the U.S. copyright-based industries suffered estimated trade losses due to piracy of nearly \$9.2 billion in 2002. On a global basis, IIPA estimates that total losses due to piracy were between \$20-22 billion in 2002 not counting losses due to Internet piracy, for which data is not yet available.

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 2001 and 2002. In each survey, IIPA has described the piracy levels in each of these countries (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.

**ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY  
IN 56 SELECTED COUNTRIES IN 2002  
(in millions of U.S. dollars)**


<b>Industry</b>	<b>Estimated Losses</b>
<b>Motion Pictures</b>	<b>1322.3</b>
<b>Records &amp; Music</b>	<b>2142.3</b>
<b>Business Software Applications</b>	<b>3539.0</b>
<b>Entertainment Software</b>	<b>1690.0</b>
<b>Books</b>	<b>514.5</b>
<b>Total</b>	<b>9208.1</b>

Appendix B summarizes the methodology used by each IIPA member association 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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